

***United States Court of Appeals
for the Second Circuit***



APPENDIX

PAGE PROOF
with affidavit of mailing
76-1405

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1405

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17-5

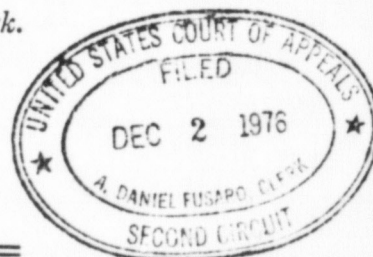
UNITED STATES OF AMERICA,
Appellant,
—against—

MICHAEL KAZUO YANAGITA and
MARC CHOYEI KONDO,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.



PAGINATION AS IN ORIGINAL COPY

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THE APPEAL AND DOCKET ENTRIES SHOW IN SECTION V THE OCCURRENCE OF EXTENSIVE DELAY PER 18 USC § 3182(b)

DATE	IV. PROCEEDINGS (DOCKETED)	PAGE TWO	V. EXCLUDABLE DELAY
8-5-76	Govts Memorandum of Law filed (forwarded to Chambers)		
8-9-76	Before DOOLING J - case called - motion argued on motion to dismiss - decision reserved - deft & attys present		
8-17-76	By DOOLING J - Order filed dismissing the indictment.		
9/1/76	Notice of Appeal filed, by government.		
9/1/76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.		
9-8-76	By Mishler, Ch J - Order filed releasing bail		
9-17-76	Order received from the court of appeals filed that the record on appeal be docketed on or before Nov. 1, 1976		
9/20/76	Stenographers transcript dated 6/25/76 filed.		
10/7/76	Stenographers transcript dated 8/9/76 filed.		
10-15-76	Record on appeal certified and mailed to the court of appeals		
10-21-76	Acknowledgment received from the court of appeals for receipt of record on appeal.		

REAL 0712 207 1 **76CR 421** **DOOLING, J.** **MISHLER, J.**
 U.S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK
 KONDO, MARC CHOYEI
 6 24 76 421 1

U.S. DISTRICT SECTION **OFFENSES CHARGED** **ORIGINAL COUNTS**
 18-401(3) Did unlawfully disobey the lawful order 1 of the U.S. District Court, Eastern Dist. of NY in that he refused to answer any questions re 75 CR 851(S)
 MISHLER

II. KEY DATES & INTERVALS

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Report	High-Risk Unit	Information X	6-24-76	
Summons Served	Indictment	Arraignment	Trial	
First Appearance	In Charging District	Final Pica	Final Pica	

MAGISTRATE

SEARCH WARRANT	DATE	INITIAL NO.	INITIAL APPEARANCE DATE	INITIAL NO.	OUTCOME
Search Warrant					
Summons					
Arrest Warrant					
COMPLAINT					
OFFENSE					

Thomas Puccio

EXCHANGEABLE DELAY

DATE	DOCUMENTS	PROCEEDINGS
6-24-76	Information filed.	
6-28-76	By MISHLER, CH J - Order to show cause filed, re 75 CR 851(S) why an order should not be made adjudging said debt for contempt, etc. (forwarded to Judge Dooling as directed)	
6-25-76	Before DOOLING J - case called - debt & counsel James Reif present - Information read to the debt - plea of not guilty entered - trial date set - week of August 23 - defense motions by July 12 - debt released on bail under T-18:3146(a)(3) upon execution of a personal appearance bond in the amount of \$2500 and a deposit of \$250 each to be made no later than June 30, 1976.	
6-30-76	By CATOGGIO, Mag - Order for acceptance of cash bail filed	
7-12-76	Defts motion to dismiss Information filed; motion for Discovery filed and defts Memorandum of Law Introductory Statement filed	
7/22/76	76 M 1318 filed in Criminal file.	
8-5-76	Govts Memorandum of Law filed (forwarded to Chambers)	
8-9-76	Before DOOLING J - case called - debt & atty present - Motion to dismiss argued - decision reserved.	

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DOCKET ENTRY SHEET - Docket entries shown in Section V are subject to exclusion of delay per 18 USC § 3161(b).

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY

8-17-76 By DOOLING J - Order filed dismissing the indictment.
 9/1/76 Notice of Appeal filed by government.
 9/1/76 Docket entries and duplicate of notice of appeal mailed to the Court of Appeals.
 9-8-76 By Mishler, Ch J - Order filed releasing bail
 9-17-76 Order received from the court of appeals filed that the record on appeal by docketed on or before 11-1-76
 9/20/76 Stenographers transcript dated 6/25/76 filed.
 10/7/76 Stenographers transcript dated 8/9/76 filed.
 10-15-76 Record on appeal certified and mailed to the court of appeals
 10-21-76 Acknowledgment received from the court of appeals for receipt of record on appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

MICHAEL KASUO YANAGITA,

Defendant.

I N F O R M A T I O N

Cr. No. _____
(T. 18, U.S.C., §401(3))

6-24-76

----- X

THE UNITED STATES ATTORNEY CHARGES:

On or about the 22nd day of June, 1976, within the Eastern District of New York, the defendant MICHAEL KASUO YANAGITA, being then a witness before the United States District Court for the Eastern District of New York, having received a lawful order of that Court, in open court, to wit: to answer questions asked of him, under a grant of immunity, during the conduct of the trial of United States of America v. Kenneth Raymond Chin and Elizabeth Jane Young, now known as "Elizabeth Jane Young Chin", Docket No. 75 CR 851(S), did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer any questions asked of him during the aforementioned trial. (Title 18, United States Code, Section 401(3)).

1/s/ DGT by ERK

DAVID S. FRANK
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

I N F O R M A T I O N

- against -

Cr. No. _____
(T. 18, U.S.C., §401(3))

MARC CHOYEI KONDO,

Defendant.

----- X

THE UNITED STATES ATTORNEY CHARGES:

On or about the 22nd day of June, 1976, within the Eastern District of New York, the defendant MARC CHOYEI KONDO, being then a witness before the United States District Court for the Eastern District of New York, having received a lawful order of that Court, in open court, to wit: to answer questions asked of him, under a grant of immunity, during the conduct of the trial of United States of America v. Kenneth Raymond Chin and Elizabeth Jane Young, now known as "Elizabeth Jane Young Chin", Docket No. 75 CR 851(S), did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer any questions asked of him during the aforementioned trial. (Title 18, United States Code, Section 401(3)).

DAVID S. FRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

MICHAEL KAZUO YANAGITA and :
MARC CHOYEI KONDO, :

Defendants. :

76 CR 420-421

United States Courthouse
Brooklyn, New York

August 9, 1976
4:30 p.m.

Before :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

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DANIEL OLARNICK
ACTING OFFICIAL COURT REPORTER
I hereby certify that the foregoing is a
true and accurate transcription of my sten-
ographic notes in this proceeding.

Daniel Olarnick
Official Court Reporter
U. S. District Court

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ETHAN LEVIN-EPSTEIN, ESQ.
Assistant United States Attorney

GLADSTEIN, MEYER & REIF, ESQS.
Attorneys for Defendants
308 Livingston Street
Brooklyn, New York

BY: JAMES REIF, ESQ.
-and-
AMY GLADSTEIN, ESQ.
of Counsel

1 THE COURT: All right, gentlemen.

2 THE CLERK: 76 CR 420 and 411, Michael Kazuo
3 Yanagita and Marc Choyei Kondo.

4 MR. LEVIN-EPSTEIN: Ready for the Government,
5 your Honor.

6 MR. REIF: Ready for the defendant, your Honor.

7 THE COURT: Go ahead.

8 MR. REIF: Your Honor, my name is James Reif
9 and this is Amy Gladstein, who'll be our co-counsel
10 for the defendants.

11 In our Memorandum of Law, we presented four
12 issues to the Court, in the nature of a motion to
13 dismiss, and some in the nature of a motion for
14 acquittal. In the Government's response, they raised
15 a fifth issue, and so I would also like to address
16 that in my remarks, as well.

17 I should like to commence with one general
18 observation as to the way in which I think the issues
19 ought to be approached: There was a time when the
20 Government took the position, generally, that basically
21 other than a Fifth Amendment privilege, a witness,
22 whether a witness in a trial or a witness in a Grand
23 Jury proceeding, that a witness had no rights,
24 essentially, other than the Fifth Amendment privilege
25 and that as soon as the Government made the offer of

1 of this thing called immunity, that essentially the
2 witness had no rights at all, and without further
3 ado the witness must, upon pain of contempt, testify,
4 whether at the trial or before the Grand Jury.

5 In the last approximately six years, there have
6 been a substantial increase in the amount of cases
7 where there have been placed in issue the rights of
8 witnesses at a trial and before Grand Juries.

9 I would venture to guess a substantial increase
10 over the amount of litigation in the proceeding 20
11 years, with respect to those questions and, as a result,
12 a trend has emerged in the law, whereby it has been
13 firmly established, at all levels in the Federal Court
14 system, that the Government's general approach to this
15 is incorrect, that is to say that the Government
16 usually has to do a lot more than simply say, "Witness
17 here's immunity, now testify." In fact, a whole body
18 of law has developed in which it has been established
19 that there are constitutional rights that a witness
20 has, that are statutory rights that are common law
21 rights and, indeed, there are rights that derive from
22 federal regulations wholly apart from the question of
23 the Fifth Amendment.

24 Moreover, it has been established that in some
25 cases the Government's mere proffer of immunity is

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1 insufficient for any one of a variety of reasons, and
2 so that, essentially, what has developed is a basic
3 principle that witnesses are persons with rights
4 before the Court, and that while their rights are
5 presented to the Court in a different posture than
6 defendants in a normal criminal case -- for example,
7 nevertheless, they are protected by the full panacea
8 of rights under the Federal Court system, as I under-
9 stand, which are derived from the Constitution, from
10 the various federal statutes, the common law and
11 federal regulations.

12 Now, one of those rights is the right to be
13 free from the imposition of double-jeopardy, and that
14 is one of the central issues presented in this case.

15 The Supreme Court has made clear that the
16 purpose of that provision in the Constitution is to
17 protect a person against successive prosecutions.
18 Moreover, it has made clear that it is designed to
19 protect not only against successive impositions of
20 judgments, but having to undergo successive prosecutions,
21 and the amount of time and energy taken up, the frus-
22 trations, the fears, the financial expenses that are
23 undertaken wholly apart from the outcome of a successful
24 proceeding.

25 Now, in the instant case the defendants were

1 were from California to testify as Government's
2 witnesses in this case and as a result of a whole
3 series of events, were subjected to substantial
4 inconvenience, not only in having to come to New York,
5 one of the defendants had to come twice, but were
6 ultimately held in contempt and had to undergo sub-
7 stantial proceedings before the Court on different
8 days; had to obtain counsel; now are back in California
9 and may even have to come back once again in light
10 of the subsequent prosecution.

11 So, I think that there is present in this case
12 the kind of jeopardy, the kind of hardship and
13 inconvenience that the Supreme Court said the double-
14 jeopardy provision is confined to protect against.

15 Now, focusing on the Government's submission to
16 the Court, I think that there is only one issue here:
17 The Government concedes, basically, that if the
18 judgment entered by Judge Mishler was in the nature
19 of a criminal contempt, then the double-jeopardy
20 provision survives and the second and instant
21 provision is barred by the double-jeopardy provision.

22 So, the sole question here is whether the
23 initial judgment entered into by Judge Mishler was
24 criminal or, as the Government contends, it was civil.

25 I think in reading our papers and reading the

1 Government's papers, the basic difference in prospec-
2 tive emerges quite clearly. The defendants take the
3 very simple position that to determine what the order
4 says, you look to the order. The Government takes
5 the position, to determine what the order says, you
6 don't look to the order, you look to everything else
7 possible, but you don't look to the order.

8 There's no contention in the Government's
9 papers, at any point, that the order is in the nature
10 of a civil contempt. There is none.

11 In fact, it could not possibly make that
12 argument. It is obvious that the order entered by
13 Judge Mishler on its face is in the nature of a
14 criminal judgment.

15 Indeed, there are other cases where Judge
16 Mishler has been faced with witnesses who have declined
17 to testify at trial or in a Grand Jury, where he has
18 entered other kinds of orders that specifically
19 provide a purge clause --

20 THE COURT: Specifically provides a what?

21 MR. REIF: A purge clause.

22 Which is what your Honor knows, from our papers,
23 is necessary to include in a contempt, to make it a
24 civil judgment.

25 I had a case before Judge Mishler involving a

1 Grand Jury witness who refused to testify, and in
2 that case Judge Mishler entered an order of contempt
3 when the witness refused to testify and included a
4 purge clause in that case.

5 There is no purge clause in the order.

6 Now, faced with that the Government says,
7 "Well, to determine what the order is, don't look to
8 the order, look to what the Judge said before it.
9 Look to what the Judge said after it, but don't look
10 to the order."

11 Now, the question I think is one we submit that
12 the order, by itself, is dispositive of the question.

13 Secondly, we contend that the Government is not
14 aided by conversation of either what the Judge said
15 before or what the Judge said after.

16 Now, I don't want to go quote by quote as to
17 what the citations in the Government's brief are.
18 Some citations don't even say what the Government
19 contends they say.

20 I merely point out one example: The Government
21 contends the following citation proves the order
22 entered was a civil order, and I quote from the
23 Government's brief, "...Judge Mishler reaffirmed his
24 earlier finding that the motions had been made in bad
25 faith and solely for the purpose of disrupting the

1 trial and avoiding the impact or frustrating the
2 power of the Court to impose coercive punishment on
3 Yanagita...."

4 Now, I don't know why the Government contends
5 that that constitutes an indication that Judge Mishler
6 wants all the witnesses in civil contempt -- it
7 contains the words, one right after the other, force
8 of punishment. Am I right? The whole thing is Civil
9 is coercive and criminal is punitive.

10 The Government contends, you look to the first
11 word and not the second. I don't know.

12 Let us assume, for the purpose of argument,
13 that every day that the defendants were brought before
14 the Court, the Judge said, "If you don't testify in
15 this case, I'm going to hold you in civil contempt
16 and I'm going to put you in jail unless and until you
17 agree to testify." Let's suppose Judge Mishler told
18 that at every single opportunity he had, when the
19 defendants were before the Court. I submit to the
20 Court that that shows nothing more than Judge Mishler
21 was performing his legal obligation to do to a
22 witness before imposing a judgment for criminal contempt.
23 He was considering and had to consider the possibility
24 of imposing criminal -- at the same time we're fighting
25 in our brief the case of United States against

1 DiMauro which is now a unanimous decision of the
2 Eighth Circuit of Appeals, and in that case there's
3 a very long discussion of a legal principle that has
4 evolved from the time the Supreme Court decided the
5 Shillitani case, and that is the principle that before
6 a federal judge imposes criminal contempt, he must
7 consider the feasibility of the alternative of civil
8 contempt.

9 The Eighth Circuit is not alone. There's a
10 recent case from the D.C. Circuit, which says the
11 same thing, so I submit to the Court, that all of
12 what Judge Mishler said prior to the imposition of
13 the order, and indeed all of what Judge Mishler could
14 have said to every witness, every single day, he could
15 have said, "I'm going to hold you in civil contempt."
16 All of that proves nothing in terms of what he actually
17 did and proved only that he was considering the
18 possibility of civil contempt.

19 Let us take a hypothetical: In an ordinary
20 criminal case, let's suppose that the trial judge
21 says to the defendant in an ordinary criminal case,
22 every day of the trial he says, "If you're found
23 guilty, I'm going to sentence you to one year in jail."
24 And the defendant is convicted and comes time for
25 sentencing and the judge sentences him to two years in

1 jail.

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2 Now, could the defendant come back in on a
3 motion to reduce sentence and say, "The Judge told
4 me before he entered the order he was only going to
5 give me a sentence of one year. Now he gives me two
6 years. I think, as a matter of law, I'm entitled to
7 a reduction of that sentence, because of what the Judge
8 said during the trial."

9 The Government would be the first to jump up
10 and object to that and properly so. I submit there's
11 no distinction between that hypothetical and what the
12 Government is contending in this case.

13 Now, as to what the Government cites, the
14 statements made by Judge Mishler, after the order was
15 entered on subsequent days, at times, I might add
16 when counsel was not present, and during the course of
17 the underlying criminal proceeding, I submit to the
18 Court that they are ambiguous, at best, and whether
19 they show a subjective intention on Judge Mishler's
20 part or subjective understanding on his part, that
21 what he did was in the nature of a civil contempt
22 of what they show happened in the Di Mauro case,
23 where the judge was considering the alternative
24 reduction of sentence, under Rule 35, was not yet
25 clear, but let us assume the worst. Let us assume

1 that what Judge Mishler was saying is my understanding
2 that what I did on June 21st was to hold these
3 witnesses in civil contempt. I suggest to the Court
4 that is not dispositive of the issue. What is
5 dispositive is what is subjectively, as a matter of
6 law, what did Judge Mishler do? There are cases where
7 District Court judges have said, "I'm holding a
8 witness in civil contempt," and when the cases have
9 gone up on appeal they are saying they are not bound
10 by what the District Court thought they were doing
11 and there are numerous cases where the District Court
12 entered civil and the Court of Appeals found it was
13 criminal.

14 Conversely, there are cases where the District
15 Court thought it was criminal and the Court of Appeals
16 found it in the nature of civil.

17 What the Judge characterized, what he thought
18 he was doing is not dispositive. I submit to the
19 Court, what the Judge did stands or falls on the
20 order entered by the Court, and what the order plainly
21 states, that the witnesses are to be confined for a
22 period of 30 days or until the end of the trial. There
23 is no purge clause. That is the key element of a
24 civil contempt, and in the absence of a purge clause
25 included in the judgment, in the order to that effect,

1 the judgment entered is in the nature of a criminal
2 contempt and, accordingly, the instant prosecution,
3 the second prosecution is barred under the double-
4 jeopardy provision.

5 Now, with respect to the question as to the
6 Fifth Amendment privilege against self-incrimination,
7 as it relates to the possibility of incrimination
8 under the laws of a foreign jurisdiction, I think
9 the Government's papers are helpful in framing what
10 are the issues, what are the contentions between the
11 parties on that issue.

12 First, I think it is significant that essen-
13 tially the Government accepts the analysis we put
14 forward as to what is the test for determining whether
15 or not the witnesses in this case had a Fifth
16 Amendment right to decline to testify, that is to say,
17 we pose a three-part test, one where the witnesses,
18 in answering the questions, tend to incriminate the
19 witnesses under the law of Japan;

20 Secondly, was there a realistic possibility that
21 their testimony could have been used against them in
22 a prosecution in Japan;

23 Thirdly, does the Fifth Amendment protect against
24 the danger of that kind of incrimination and use of
25 the testimony?

1 The Government essentially accepts that as the
2 framework of analysis in its papers. Moreover, it
3 accepts the factual position of the defendants that
4 it was the Government's view that the guns at issue
5 in this case, that is the guns that the Government
6 wanted the witnesses to testify to, they sold to the
7 defendants in the Chin case, were to be used as part
8 of a plot to assassinate the Emperor of Japan, and
9 the Government challenges none of that and, indeed,
10 it does know, since it is in all of the papers
11 submitted by the Government in the underlying Chin
12 case -- we've supported the Government's application
13 in support of the search warrant by the Secret Service
14 agents; we've quoted other documents; we've quoted
15 the Government's notation in the newspapers and so
16 forth. All that is based on the Government's own
17 statement of the case and, indeed, it was the
18 Government which informed me of that aspect of the
19 case, because when I first came into the case I never
20 heard of the defendants; never heard of the witnesses
21 and anything in connection with Emperor Hirohito,
22 in connection with this case, and it was the Govern-
23 ment's counsel that informed me as to that aspect of
24 the case.

25 I think we begin as to an agreement of the

1 framework of the analysis and an agreement of the
2 basic facts giving rise to the legal issue.

3 As to the first question, whether or not there
4 was a possibility of i crimination under the laws of
5 Japan, I would only point out that the test is not
6 whether assassination of the Emperor or providing
7 guns for that purpose, in and of itself, would be
8 sufficient to contitute a violation of Japanese law,
9 that is not the test. The test is only whether or
10 not providing arms would provide a link in the chain
11 of evidence needed to prosecute under Japanese law.
12 That is the test and, specifically, the provisions
13 involved are Article 77, 78 and 79 of the Japanese
14 law.

15 I would note, in this regard, there is an
16 implicit concession by the Government in its papers
17 that an assassination of a Japanese official is
18 evidence of violation of Article 77.

19 The Government's sole contention is that this
20 particular official is excluded from the normal rule,
21 because the responsibilities that this particular
22 official had are largely symbolic and that differen-
23 tiates the Emperor from the ordinary Japanese
24 official. That is to say if the contention had been
25 that there was a plot to assassinate the Prime

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Minister, that the Government would concede, at least, it makes no contention to the contrary in its paper that that would not be evidence of a violation of Article 77, 78 and 79, and its sole contention is by virtue of the largely symbolic nature of the position of the Emperor that the normal rule doesn't apply.

Now, I should like to take that question on directly and I don't want to quibble about whether the responsibilities of the Emperor are large symbolic, entirely symbolic, et cetera. We will concede they are largely symbolic; we will make no contention that the Emperor is, in any way, akin to the President of the United States or anything like that. We suggest, rather, that the symbolic nature represents the Government; it supports the defense position.

I think a helpful example is the consideration of statutes in the United States. There is a federal flag desecration statute and there are probably similar statutes in every State in the country. Why is that? Is it because the piece of cloth the flag is composed of is worthy of federal protection or is it something more than that? I submit to the Court it is precisely because of the symbolic value to the flag, to the nation or to the State. That is why

1 flag desecration is made a crime.

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2 Similarly, in any kind of situation where a
3 new government comes into power in a country, one of
4 the first things that's done is all the old statues
5 are taken down; all the old flags are taken down;
6 all the old paintings are taken down and in their
7 place there are new flags; new statues; new paintings;
8 new pictures and so forth.

9 I submit, it is precisely because of their
10 symbolic value that that kind of thing happens.

11 So, far from showing -- supporting the
12 Government contention that an attempt to assassinate
13 the Emperor would not indicate an attempt to overthrow
14 the Government, I suggest the contrary, it is precisely
15 the effort to murder and assassinate a figure who was
16 largely symbolic in terms of the state -- it does
17 demonstrate that necessary link in the chain of
18 evidence to properly evoke the Fifth Amendment.

19 One other point that the Government argues,
20 on the second aspect of the issue, that is to say
21 whether or not there is a reasonable possibility of
22 the use of the testimony. The Government says there's
23 no prosecution pending in Japan. I don't know
24 precisely why the Government makes that argument.
25 Certainly if someone came into this court and evoked

1 the Fifth Amendment on the grounds they might
2 incriminate themselves, under federal law, no one
3 would say you can't do that unless you're under
4 indictment in Federal Court and obviously, the test
5 is no different with respect to Japan, no different
6 with respect to another State or a second jurisdiction
7 in the United States.

8 Now, there's an allusion in the Government's
9 papers, that is a statement to the effect that Judge
10 Mishler could have sealed the testimony, could have
11 taken the testimony in camera.

12 Now, apart from the fact that my recollection
13 was there was no mention of an in camera proceeding
14 and only mention of sealing the testimony, apart from
15 that factor, it's not a question of what Judge Mishler
16 might have done or what he could have done, it is a
17 question of what he did do, and that relates to the
18 question of whether, at the time the witnesses were
19 ordered to testify and declined to do so, whether,
20 at that precise moment they had a reasonable apprehension of the incrimination under the law of Japan, and,
21 in use of their testimony in a prosecution, and I
22 suggest, wholly apart from whatever Judge Mishler
23 might have done, in reality, he entered no such order;
24 there was no protection given to the witnesses at the
25

1 moment they were ordered to testify; that the
2 testimony was going to be sealed or it was going to
3 be taken in camera or anything of that sort. There
4 is no such order.

5 A helpful analogy, let us explore, a witness
6 declines to testify on the grounds of the Fifth
7 Amendment, and without granting a witness immunity
8 under the federal law the judge ordered the witness
9 to testify; he just ordered him without granting
10 immunity; the witness declined and subsequently is
11 charged with criminal contempt. Could the witness
12 have come into court and said, "Well, it's true the
13 judge could have granted the witness immunity under
14 the provisions of the federal law and didn't, but
15 even though he didn't -- therefore the witness didn't
16 have the right to testify because the judge could
17 have provided immunity, but he didn't."

18 I suggest that is specious and I suggest the
19 Government's contention in that regard is the same.

20 Now, a second point on that issue is, let us
21 suppose Judge Mishler did enter such an order, even
22 though he didn't. Let us suppose he didn't. The
23 testimony could be taken in camera or the testimony
24 could be sealed, either/or, I suggest, that is
25 insufficient protection. The reason it is insufficient

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1 protection is that the witness has no guarantee that
2 the testimony, itself, will not become public; will
3 not be turned over to Japanese officials. If, in
4 fact it is, there's nothing the witness can do about
5 it and there's nothing the Court can do about it,
6 because once the cat is out of the bag, the cat is
7 out of the bag. The person who made the unauthorized
8 disclosure might be subject to prosecution, contempt,
9 disciplinary proceedings or whatever; that wouldn't
10 be any aid to the witnesses whose self- --

11 THE COURT: Is there a Fifth Amendment privilege
12 under the law of Japan?

13 MR. REIF: Well, I'm not precisely clear about
14 that.

15 I know that in -- Judge Mishler made a ruling
16 in the trial in which he says --

17 THE COURT: Judge who?

18 MR. REIF: Judge Mishler made a ruling to the
19 effect there was no Fifth Amendment right of a person
20 under Japanese law and that was, in fact, while he
21 wasn't upholding the invocation of privilege here.
22 I think if Judge Mishler is correct on the legal
23 issue, then the converse flows from that legal
24 proposition. It is to say it is precisely because
25 there is no Fifth Amendment privilege under the

1 Japanese law, then the witness would need the pro-
2 tection here in this case.

3 If the testimony were to be disclosed to
4 Japanese authority, there would be nothing under
5 Japanese law which would prevent its introduction
6 into Japanese proceedings.

7 If Judge Mishler is correct on that legal
8 proposition, then I suggest that the witness did have
9 the right.

10 In any event, I think it's what Japanese courts
11 might do, subsequent to the giving of testimony. It
12 is somewhat speculative at best, so that if there
13 were a Fifth -- an equivalent to the Fifth Amendment
14 under Japanese law at the time, there's no guarantee
15 that the testimony, in fact, would not be introduced.

16 Obviously, as your Honor is well aware, the
17 contours of the Fifth Amendment have been flowing --
18 undergoing substantial change, and I submit there is
19 a comparable flow in the law of Japan as well.

20 So, I think that despite the Government's con-
21 tention that the Court is confronted with and must
22 decide the basic constitutional question, that is to
23 say whether the Fifth Amendment protects against
24 incrimination under the laws of a foreign country,
25 because I think the first two questions are clear,

1 that is to say, the witnesses did face the possibility
2 of incriminating themselves under Japanese law by
3 testifying, and they had no guarantee that their
4 testimony would not be used against them in Japan.
5 I don't want to belabor that, this basic constitutional
6 question. I think it's well set out in Judge Newman's
7 opinion in Cardassi --

8 THE COURT: In which?

9 MR. REIF: In Cardassi, which we rely upon,
10 which we follow, which we think if Judge Newman's
11 opinion flows inevitably from the Supreme Court opinion
12 in Murphy in 1964, where it said, explicitly, we adopt
13 as the correct interpretation of privilege, the
14 holding in the English case of the United States
15 vs. McRae in which the English court had specifically
16 held that the privilege in England did protect against
17 incrimination as to the law of a foreign country and
18 the Supreme Court said, specifically, "We adopt that
19 as the correct construction of the Fifth Amendment
20 privilege.

21 So, I think Cardassi was a foregone conclusion
22 and, as I say, we rely on Judge Newman's opinion in
23 that regard.

24 As to the Parker case, as cited by the
25 Government, what the Court said there, is, at best

1 an alternative holding or dictum. I suggest that it
2 was simply stated without any explanation.

r2 3 I also suggest that it not only was wrong, but
4 the premise upon which it was based was incorrect,
5 that is, that there was a statement to the effect,
6 well, if the privilege is upheld here, there's all
7 sorts of funny laws in foreign countries as to what
8 is and what is not a crime. If the witness can invoke
9 a Fifth Amendment privilege, then all sorts of
10 possibilities might occur.

11 The Court cited as an example, what if the
12 foreign country may make failure a crime, which is
13 irrelevant to the Fifth Amendment question posed here.
14 There are two responses to that, that that is not
15 the kind of statute that we're dealing with in this
16 case, we're dealing with the most basic kind of
17 statute, a statute directed at the overthrow of the
18 Government. It is a statute, presumably, that is
19 present in every state, including the United States,
20 and every State within the United States.

21 Secondly, as we go to our brief, there is
22 concern to that effect, but including that kind of
23 provision the Supreme Court -- the United States can
24 simply exercise its treaty-making power to exclude
25 that kind of criminal statute from the scope of any

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1 extratraditional treaty. I think the concerns raised by
2 that are of no concern here.

3 As to the question of electronic surveillance,
4 I think the authorities are well traced and I don't
5 want to belabor the legal principles. I would only
6 emphasize certain facts.

7 One: I think it is important for the Court to
8 understand the sequence of events. The first defendant,
9 Mr. Yanagita was subpoenaed to appear in the first
10 trial.

11 The second defendant, Mr. Kondo, was not
12 subpoenaed to appear for the first trial, was subpoenaed
13 to appear for the second trial. Both live in
14 California. Mr. Kondo needed to come to New York in
15 order to consult with us, obviously, with respect to
16 his legal situation, and because of the fact he was
17 in California could not make two trips, could only
18 come once, and so we arranged through Mr. Ethan
19 Levin-Epstein that Mr. Kondo might come a few days
20 earlier, which was his appearance, June 21st, which
21 was a Monday. We arranged that he come on, I believe,
22 Friday. Mr. Levin-Epstein made those arrangements
23 and Mr. Kondo did come early. That was the first
24 time we met him and talked about his case. It was
25 at that point he formally retained us.

1 Now, in the course of our discussion, his
2 situation -- it was at that point that we realized,
3 for the first time, that there was a possibility
4 of electronic surveillance having been directed at
5 the witnesses and that was based upon certain state-
6 ments that Mr. Kondo had made to us and the Government --
7 implicit or explicit projection of the Government was
8 somehow we could have raised this contention when
9 Mr. Yanagita was first here several weeks before.

10 I suggest to the Court that to do so would not
11 have been to proceed in good faith.

12 I've been counsel in a number of cases involving
13 representation of witnesses, particularly in Grand
14 Jury proceedings, and in some of those cases there are,
15 as adequate basis for some such a claim, and in some
16 of those cases there are not, you have none.

17 I suggest to the Court, it is not proceeding
18 in good faith to make that kind of motion, which can
19 be done relatively simply by an affidavit and motion,
20 it can be done relatively simply without having an
21 adequate factual basis to do so.

22 Moreover, I suggest to the Court that as the
23 body of law has developed, it has shown a tendency
24 to require more than simple mere accusation.

25 Some of the earlier cases indicated a bare

1 allegation, unsupported by any particulars would be
2 enough to trigger the Government's obligation.

3 The trend of the law is more than that, requir-
4 ing more of a showing by the witnesses.

5 So, I think, it was entirely appropriate for
6 the motion to be made at the time it was, when
7 Mr. Kondo presented to us, in the discussions we had,
8 the facts which laid the basis for that claim.

9 We learned those facts, as I said, from
10 Mr. Kondo, when he came to New York, only a few days
11 before the appearance on June 21st.

12 The motion was drawn up and it was presented
13 to the Court before the Chin trial began on the morning
14 of the 21st, which was the first court day subsequent
15 to our determining those facts.

16 Simply, Mr. Yanagita, I believe, arrived on
17 the 20th, and it was based upon our conversations
18 with Mr. Kondo that we inquired of Mr. Yanagita to
19 see whether or not there was a basis for making the
20 claim in his case. It was the di cussion with
21 Mr. Kondo that triggered that and Mr. Yanagita's
22 motion was presented together with Mr. Kondo's motion.

23 I think it's important to put those facts before
24 the Court.

25 As I indicated, I don't want to belabor the

1 the legal principles in the development of the law.

2 I think the authorities from the Second Circuit
3 and the Quinn case, in particular, from the First
4 Circuit, are set forth at some length in our brief.

5 I would like, however, to address one other
6 factual aspect of the case, and that is precisely:
7 What does the Government have to do in order to make
8 an inquiry with the appropriate agencies in order to
9 make a response to the claim of electronic surveillance
10 of a witness or a criminal defendant? That was not
11 put before Judge Mishler.

12 There was representation that it was an onerous
13 process, that it took a long time, and I think it's
14 important to be precise about that. I might note,
15 initially, Judge Newman's opinion, in the cases which
16 are cited in our papers -- there was another claim in
17 that proceeding and the Government made the same kind
18 of general observation, how it was an onerous process --
19 there was a quote taken from Judge Newman's opinion,
20 which was reported thus far -- there has been no
21 details supplied by the Government to me concerning
22 the search of the files. In the absence of such
23 details, the assumption of a heavy burden is not
24 warranted. Moreover, it's not warranted by the
25 absence of the details, by the Government, nor is it

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warranted by the facts, if it had those details.

Now, the Government's system is as follows:

There is an index, a file kept by each Government agency, which conducts electronic surveillance and the index is done by name, in alphabetical order. If a court authorization is obtained for electronic surveillance of a particular person or persons, their names appear in the file.

Similarly, if the Government contends no court authorization is required in the particular facts of a case, wholly apart from the legality, but simply makes that contention, but directs the surveillance of that particular person, their names, likewise, appear in the file of each agency that is conducting a surveillance.

Now, the question is: What happened -- is that an adequate file? What happens if A is the subject of electronic surveillance and A calls B; B knows the subject of the surveillance? What the Government does is listen in to the conversation; if B identifies himself or themselves or from -- it does use their names, necessarily, but from the contents of the conversation the identity can be ascertained, then B's name is likewise included in the index. Is there a single index done of individual people, in

1 alphabetical order who the Government has obtained
2 orders as having been identified under by surveillance,
3 under federal agency, that is the total of the
4 Government's records with respect to electronic
5 surveillance.

6 When we hear this thing about the onerous
7 process, what we're really talking about, in Judge
8 Newman's case, where it takes the Court Clerk about
9 an hour to go through the file, that is Judge Newman's
10 Clerk, how is that an onerous process that the
11 Government has to be put through. I think it's
12 important to bear that in mind, in light of the
13 sequence of events in this case.

14 Indeed, the Government was able to make a
15 representation to one of the agencies in this case,
16 I believe it was the Bureau of Alcohol, Tobacco &
17 Firearms. I believe if it could have done that, it
18 necessarily had to make inquiry with the Secret Service
19 and FBI, both of whom immediately conducted electronic
20 surveillance, and both of whom immediately were
21 involved in the investigation of this case and did all
22 the initial investigating. It was the Secret Service
23 which applied for the search warrant; it was the
24 Secret Service who arrested the Chin defendants; it
25 was the Secret Service who put out the initial arrest

and it was the FBI which provided the tips -- the FBI in Los Angeles, which is the situs of the two defendants in this case, not the situs of the Chin defendants.

So, I think it's clear, on the basis of the sequence of events, on the basis of the Government's record keeping system and on the basis of the Santangelo case, that the Government necessarily had to make inquiry with the Secret Service in this case and necessarily had to make inquiry with the FBI, and the moment they were ordered to testify, the witness faced with the directive, the response from the Government, they had the statutory right to decline to argue the evidence; without the statute, the assurance from the Government that their testimony could not be derived.

We raised, in our papers, a fourth issue, that was whether or not there was statutory authority for the Government delegating power to approve compulsory testimony applications -- that is to say whether or not Section 2516 permits a delegation of the power to approve an application to the Court for immunity.

I'm sorry, I've given the wrong citation. It is Section 6003(b), which provides that the United States Attorney may, with the approval of the Attorney

1 General, the Deputy Attorney General or any designated
2 Assistant Attorney, request an order compelling the
3 witness to testify.

4 The question we raise, in our brief, is whether
5 or not that allows for someone else to approve the
6 Government's application, and our contention is: It
7 does not.

8 To rely upon the analogous decision in the
9 Giordano case, and the Acon decision in the Third
10 Circuit, the Government has addressed that -- I don't
11 want to belabor it, if your Honor has questions on
12 the point, I'd be glad to try to respond to those --
13 the Government does, however, address the separate
14 contention, raise the separate contention, and that
15 is, assuming the first issue, aside of whether or not
16 the Government complied with the Code of Federal
17 Regulations, specifically entitled 28CFR, Section 0.133,
18 and the Government addresses its submission to the
19 Court, to the factual question of whether or not there
20 was compliance with that federal regulation and
21 contends, in part, that it doesn't matter; that even
22 if there wasn't a compliance with the section -- what
23 I will refer to as Section 133, that nevertheless the
24 witness had no right to decline to testify.

25 I think that's a basic point that must be

1 addressed. I also think it has to be rejected. There
2 are numerous cases which are -- which support the
3 proposition that if the Government adopts a regulation,
4 that it is bound by that regulation, even though it
5 was not required to enact that regulation in the
6 first place.

7 There are numerous cases from the Supreme Court,
8 and I cite just a few, the doctrine originated with
9 the Acardi case vs. Shaughnessy, 347 U.S. 260, which
10 is a 1954 decision that was followed by Service
11 against Douglas (phonetic) 354 U.S. 353; Vit Realty
12 (phonetic), vs. Seaton (phonetic), 359 U.S. 535 and
13 Yellin (phonetic) against the United States, 374
14 U.S. 109.

15 Yellin is an interesting case, because it
16 involved the refusal of a person to testify and being
17 held in contempt for refusing to testify and it was
18 reversed because the committee had not followed its
19 own guidelines in conducting its proceedings.

20 A more recent case, which is a District Court
21 opinion, which was somewhat helpful, was Nater
22 (phonetic) against Berk, 366 F. Sup. 104, and that's
23 a case in which Judge Gazelle (phonetic) ruled that
24 the Government's firing of Archibald Cox, as the
25 Special Prosecutor was illegal, and it was illegal

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1 under federal regulations that were promulgated in
2 the CFR, and held that the Government was bound to
3 follow those rules.

4 I think the doctrine is most poignantly stated
5 by Justice Frankfurter when he concurred in the
6 Zicarelli decision in the Supreme Court in 1959, he
7 said an executive agency must be rigorously held to
8 the standards by which it professes its actions, to
9 be judge accordingly, if dismissal from employment,
10 which was the issue in that case -- if dismissal from
11 employment is based upon a defined procedure, even
12 though tenuous -- I don't know the requirements that
13 bound such an agency -- that procedure must be
14 scrupulously observed. This judicially involved a
15 rule of an administrative law now firmly established --
16 and if I might add, rightfully so. He that takes the
17 procedural sword shall perish with that procedural
18 sword.

19 I suggest to the Court the regulations promul-
20 gated and published in the CFR are binding on the
21 Government and necessarily have to be complied with
22 in this case.

23 Now, the Government makes two other arguments
24 here which I should like to address myself to,
25 briefly:

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1 One, it cites the Tierney case, with the
2 proposition that the guidelines need not be complied
3 with. I can only point out to the Court that the
4 guidelines at issue in the Tierney case are not the
5 guidelines in issue in this case. The ones at issue
6 here are not published in the CFR and are not normal
7 guidelines, and they are contained -- I have it here
8 somewhere -- they are contained in a letter from
9 Richard Klein (phonetic) -- at the time he was Attorney
10 General to Emanuel Celler who was the Chairman of the
11 House Judiciary Committee.

12 I will be glad to hand them to the Court. They
13 are separate guidelines; they are not published in
14 the CFR and therefore Tierney is extinguishable (sic)
15 in this case. I might add, I was one of the counsel
16 in the Tierney case and I know what the values were
17 at issue.

18 The other argument the Government makes is one
19 I will label, "What difference does it make? Suppose
20 the guidelines, the regulations were not complied
21 with, what difference would it make? The witness is
22 going to get immunity any way. What's the big deal?
23 They should testify even if they did -- if the
24 application wasn't valid, the Court's order is still
25 in effect. The immunity is still in effect. What

1 difference does it make?"

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2 I'm somewhat surprised the Government makes
3 that argument, because approximately five years ago,
4 they made precisely the same argument in the Court
5 of Appeals -- in the Circuit -- and the Court rejected
6 the argument. We cite, in our brief, the Vericker,
7 446 F. 2d, which involved the case in which a witness
8 was granted transactional immunity, the broader type
9 of immunity, which was under the old statute, which
10 has now been appealed. The Government had no statutory
11 authority to confer immunity; it did not confer
12 immunity and the Court made precisely the same
13 argument and said, "What difference does it make even
14 if there is no authority for the application? The
15 witness is still going to get immunity, and, indeed,
16 in that the witness was going to get transactional
17 immunity and it was unanimously rejected in the Court
18 of Appeals with an opinion by Judge Friendly. As I
19 said, the citation is in our brief.

20 Now, I think the Government's papers preceding
21 to the factual question raised by the Government, that
22 is to say whether there was compliance with Section
23 133 in this case, I think the Government's papers
24 in this case indicate fairly clearly that there was
25 not.

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1 First of all, let me, if I may, refer your
2 Honor to Section 133. It says, the head of each
3 agency or unit within the department is authorized,
4 in the case of absence from his office or in the
5 case of his inability or disqualification to act, to
6 designate his ranking deputy or his equivalent, who
7 is able to act in his stead, if there is -- who is
8 available to act in his stead. If there is no deputy
9 available or in the case of inability or disqualifica-
10 tion of each deputy or other unusual circumstances,
11 any other official in such may be do designated.

12 At the outset, I will point out to the Court
13 that Section 133 has to be read in conjunction with
14 the provision which is not cited by the Government,
15 which is Section 178 in the CFR, 28 CFR Section 0.178,
16 and that provision follows upon Section 175, which
17 says, in essence, that the head of the Criminal Division
18 of the Justice Department can apply to the Court's --
19 can approve an application to the Court to compel a
20 witness to testify. And following up that provision,
21 Section 178, which is entitled redelegation of
22 authority states that in Section A, as follows, the
23 Assistant Attorney General in charge of the Criminal
24 Division and the Assistant Attorney General designated
25 in Section 0.175(B) are authorized to redelegate the

1 authority 'delegated' to their respective deputies,
2 Assistant Attorney Generals, to be exercised solely
3 during the absence of such Assistant Attorney General
4 from the City of Washington.

5 So that the Government has -- Section 133 has
6 to be read in conjunction with 178.

7 Now, turning to the representation made by
8 the Government in its papers, we see the following:
9 First there is an identification of Richard Thornburgh
10 as the head of the Criminal Division; there is an
11 identification of John Keeney as the second ranking
12 Deputy immediately below. Now, the Government's
13 representation to the Court is as follows: This office
14 has been informed that through longstanding oral
15 authorization from Assistant Attorney General
16 Thornburgh, when he is away from Washington, D.C.,
17 Mr. Keeney is authorized to take over his duties
18 relative to 18 U.S.C. Section 6003.

19 The following sentence reads, "Likewise, in
20 the unlikely event that both Assistant Attorney
21 General Thornburgh and Deputy Assistant Attorney
22 General Keeney are away from Washington, D.C., Deputy
23 Assistant Attorney General Keoch becomes the Acting
24 Assistant Attorney General."

25 Now, I will submit, firstly, that no such oral

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authorization complies with the terms of Section 133 and 178 and, furthermore, there is not even a representation by the Court that Mr. Keoch was every authorized to act relative to Section 6003.

If the Government's papers are scrutinized carefully, there is a representation that Keeney was authorized to act relative to Section 6003, but no such representation to Mr. Keoch, which was the person authorized to act in the Government case with respect to Mr. Kondo.

Now, I would submit, first, that the Government, whatever Mr. Keoch was authorized to do, that in the first place, any such authorization had to be in writing.

I suggest that is supported in two respects. First, it is supported by another provision in the CFR, this is 28 CFR Section 0.180, and the following sections, that is the section that immediately follows the section that I read to your Honor before, and what it says, unfortunately, it's a few sentences long, but I think I should read it. It says, "All documents relating to the organization of a department or to the assignment, transfer or delegation of authority, functions or duties by the Attorney General or to general department policy shall be designated as orders

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1 and shall be issued only by the Attorney General in
2 a separate numbered series, classified order shall
3 be identified as such, including within the numbered
4 series and limited to the distribution provided for
5 in the order or determined by the Assistant Attorney
6 General for administration. All documents amending,
7 modifying or revoking such orders in whole or in
8 part shall likewise be designated as orders within
9 such numbered series and no other designations within
10 such documents shall be used.

11 I suggest that section clearly contemplates
12 any authorization of anybody within the Criminal
13 Division, other than Mr. Thornburgh must necessarily
14 be in writing. The Government failed to comply with
15 Section 180 in apparently making this kind of long-
16 standing authorization.

17 I suggest, moreover, that matters of policy
18 likewise compel the same conclusion. I think that
19 the choice here is between accountability on the one
20 hand and what has euphemistically been known as
21 deniability on the other hand. That is to say, how
22 is anyone going to know what's going on in the
23 Department of Justice. Is it desirable in matters
24 such as applications for electronic surveillance or
25 matters such as application for orders compelling

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1 testimony, that there be an identifiable accountable
2 person, someone who can be held accountable for what's
3 going on or not? Is it more desirable if there be,
4 in effect, the principle of denial, which is that
5 everyone can cover their own behind, and in this case
6 anything that goes wrong, there's nothing written down.
7 That holds anybody deniable and nobody can be held
8 to anything. I think that's not an abstract question,
9 in view of the Watergate question and in view of the
10 Government's now exposed practices to electronic
11 surveillances when precisely that was sought to be
12 achieved when Mr. Mitchell was Attorney General,
13 whereby he had an Assistant Attorney General sign
14 certain applications and create the impression,
15 through the Court, it was someone else who was
16 approving the authorization for the obvious purpose
17 of deniability.

18 That is to say, it subsequently proved
19 embarrassing, that that application had been made --
20 then Mr. Mitchell apparently didn't know anything about
21 it and could deny it.

22 So, I suggest to the Court that both Section
23 186 and the principle of accountability, the principle
24 that in matters expecting to compel witnesses to
25 testify to self-incrimination, there must be an

1 identifiable, accountable individual who is authorized
2 to approve such applications.

3 I think the Government, by its own representa-
4 tion in its brief has failed to comply with the
5 letter and the spirit of the CFR.

6 One final statement if your Honor is in doubt
7 as to what actually happened by the vagueness of the
8 Government's representation to the Court, I submit
9 that what to be done, if your Honor is inclined to
10 disagree with respect to the requirement that we
11 suggest, that any such authorization be in writing,
12 that if your Honor is inclined to disagree with that,
13 that there be an evidentiary hearing, in which the
14 Government is asked to produce Mr. Thornburgh and
15 Mr. Keeney and Mr. Keoch to determine, precisely,
16 who said what to whom and when it was said, to the
17 extent that an oral authorization is going to be
18 any good in any situation. I think the vague repre-
19 sentation to the Court here is simply insufficient
20 and I know that in cases involving electronic sur-
21 veillance, where the analogous is different, there is
22 some question as to who authorized -- whose authoriza-
23 tion and who signed, whose signature, who told what
24 to whom; there were hearings such as that ordered in
25 those cases by the various judges involved, but I make

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1 that suggestion in the alternative because I think,
2 as a matter of law, it's not required of me and that
3 the Court can find, as a matter of law that any such
4 authorization must necessarily have been written and,
5 A, there was no such written authorization in this
6 case to anyone and, secondly, the Government doesn't
7 contend that; therefore there was a delegation of
8 authority to Mr. Keoch, in particular to approve
9 applications pursuant to 6003 and, I think, in light
10 of that the Court will find, on the basis of those
11 facts alone, that the application with respect to
12 Mr. Kondo was null and void.

13 I've taken quite a bit of time and I apologize
14 to your Honor for that. There were several issues
15 before the Court.

16 MR. LEVIN-EPSTEIN: Your Honor, Mr. Reif points
17 out the lateness of the hour and I'll mention, for the
18 record, and I'm sure you're well aware of the inclement
19 weather. If the Court wishes to hear from the
20 Government at another time, I'll be happy to respond
21 now or whenever your Honor wishes.

22 THE COURT: I think we're rushing up on the
23 trial date.

24 MR. LEVIN-EPSTEIN: Very well.

25 I can represent that my remarks will be sub-

1 stantially briefer than those of counsel for the
2 defendant.

3 Is there any particular order in which the
4 Court wishes to hear the Government's response?

5 THE COURT: No. I think, if you have a chosen
6 order, it will be best.

7 MR. LEVIN-EPSTEIN: Your Honor, it really makes
8 very little difference. For the convenience of the
9 record, I will go in the order Mr. Reif elected, the
10 order contained in his memorandum of law.

11 Briefly, the Government takes issue, certainly
12 with Mr. Reif's characterization of the contempt
13 proceeding executed by Judge Mishler in the proceeding
14 before him.

15 I think to characterize the test as being one
16 of what's contained in the objective order -- I
17 believe I'm quoting Mr. Reif accurately, I think as
18 the classic example of elevating form over substance
19 to suggest to this Court or to any other -- I'll be
20 very brief -- there was anything other than this
21 civil contempt designed for the purposes of coercing
22 Yanagita and Kondo to testify, as they were required
23 to by law, I think is reminiscent of Alice in
24 Wonderland. It has no resemblance to real life. To
25 that extent, characterized by the argument in the

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1 Government's Memorandum of Law, and disingenuous, I
2 think that's charitable, in all due respect to
3 Mr. Reif and his advocacy. It's ridiculous to expect
4 the Court that Judge Mishler intended to impose a
5 criminal contempt, for the record in and of itself
6 bespeaks a clear intent.

7 THE COURT: Was it made clear to the men
8 involved that if they -- as soon as they were ready
9 to testify, they should come over and do it?

10 MR. LEVIN-EPSTEIN: I think the only way to
11 answer that question, your Honor, and the best way
12 is to refer to the record itself.

13 The Government has included, as part of its
14 Memorandum of Law, an appendix or series of appendices
15 which contain those portions of the record below,
16 which relate to both the defendants Yanagita and
17 Kondo.

18 As I indicated in the Memorandum of Law, of
19 course, all citations refer to the trial transcript
20 in the Chin case.

21 However, in the interest of brevity, I will
22 merely select those few portions which I think are
23 dispositive of the Court's questions.

24 Directing the Court's attention to page 5
25 of the Government's Memoranda -- pardon me, the
Court recalled to counsel and to the defendants, at

1 the second that at the first trial where Yanagita
2 had refused to testify before, and I will quote for
3 the record from page 154 of the trial transcript,
4 Judge Mishler said, and I quote "...I indicated to
5 him that if he failed to testify under a grant of
6 immunity, that he would be placed in custody as a
7 coer measure to compel his testimony..."

8 Moving along, Judge Mishler, as I say, again
9 on page 5, Judge Mishler expressly stated it was a
10 coercive measure, citing page 161 and 162 of the trial
11 transcript, this is Judge Mishler speaking, again
12 "...I will give you one last opportunity to answer
13 the question. If you fail to do it, I intend to
14 commit you to the custody of the Attorney General or
15 the Marshal for the Eastern District of New York..."

16 He continued to say, "...unless he changes his
17 mind by tomorrow morning..." he intended to commit the
18 witness as indicated.

19 On page 176 and 177, your Honor, of the trial
20 transcript, this is a direction given by Judge
21 Mishler to Mr. Kondo, and I quote, "...you are directed
22 to return here tomorrow at 9:15 and at that time I
23 will give you a last chance to purge yourself of the
24 contempt and change your mind. Think about it.

25 If you refuse to answer, I intend to commit you

1 to the Metropolitan Correctional Center or to the
2 custody of the Attorney General of the United States
3 until such time as you answer but no longer than
4 six months or the duration of the trial of this case,
5 and you can purge yourself at any time before that
6 time --" meaning the commitment -- "by answering."

7 Page 390 of the transcript, indicating what kind
8 of a sentence might be imposed upon the defendants,
9 he said to them, "...that there will probably be a
10 short sentence..." then he went on, and I quote, "I
11 want that clearly understood, so there is no complaint
12 later..." I'll interrupt myself, your Honor. It is
13 almost as if Judge Mishler had anticipated this very
14 argument by Mr. Reif before whatever Court would hear
15 his motions on a subsequent occasion. He continued,
16 and I quote, "You always have a chance to purge
17 yourselves at any time up until the time the jury
18 renders its verdict, because up until --" it says
19 them it should be then, it's a typo, -- "your testimony
20 can be given."

21 As I indicated in the Government's Memoranda
22 of Law, page 8, the following on the part of Judge
23 Mishler and the Court's intent was confirmed when the
24 jury returned, and the Judge specifically announced
25 to the jury that his desire and intent was to give

1 them, "...a taste of the pressures," meaning the jail,
2 so they would turn around and change their minds and,
3 in fact, testify as they have been ordered to do so.

4 I believe that should answer the Court's
5 question as to whether or not the defendants were
6 advised of their ability to -- to coin a phrase, to
7 open the jailhouse door with the key, which they held
8 in their own hands.

9 I think this is a classic example of civil
10 contempt.

11 In fact, I might add, in response to Mr. Reif's
12 points, that Courts of Appeal recognized that in fact
13 what a Court announces as being its intention may,
14 in fact, not be what happened.

15 I believe Mr. Reif used this example of a
16 court that announced what was a civil contempt and
17 the Court of Appeals indicated that it was a criminal
18 contempt.

19 I suggest to the Court, those situations --
20 I don't have the cases at my fingertips, but I point
21 out neither did Mr. Reif. Those are situations where
22 a Court mistakenly characterized its own intention at
23 that time but, in fact, the Court of Appeals recog-
24 nizing the full pragmatic effect of the totality of
25 the circumstances below, in fact, held what had

1 happened was in fact what actually happened and not
2 some nomenclature of an attempt as to what should
3 have happened.

4 In fact, I may point out that Judge Mishler
5 never said this was a criminal contempt, either. I
6 merely make that point.

7 Mr. Reif, in making his oral argument, seems
8 to suggest every time the Government doesn't speci-
9 fically deny something, that we concede it.

10 I'm aware of no rule of pleading which requires
11 that, but that's by the Board.

12 In any event, I don't believe that any more
13 time need be devoted, unless the Court wishes that
14 the issue of civil or criminal contempt be the issue
15 of self-incrimination.

16 Whether or not either or both of these defen-
17 dants had a feeling, subjected as it was, that they
18 might be incriminating themselves in Japan, I don't
19 really believe goes to the issue involved, because
20 clearly the Supreme Court of these United States and
21 every Court of Appeals decision of which I'm aware
22 speaks to the test which Mr. Reif referred, in that
23 when can somebody invoke the Fifth Amendment? When
24 he has a reasonable belief that it might add a link
25 to the chain. Certainly that's not argued, that's

1 black letter law. In fact, it's Hornbook law. That's
2 not the test about which we should be concerned about
3 here.

4 In fact, here we should be concerned with whether
5 or not there was a real possibility that this testimony
6 that would be obtained from the witness stand would
7 add a link to a prosecution in a foreign jurisdiction.

8 Now, there's no showing, and there has been no
9 showing of any kind throughout this proceeding or the
10 proceeding below before Judge Mishler or, in fact,
11 either of the proceedings below Judge Mishler that the
12 Government of Japan or the Imperial Judiciary of
13 Japan, if there is such a thing, had any interest in
14 Yanagita or Kondo, whatsoever. I don't know whether
15 they do or don't. I don't know that any more than I
16 know what Article 77 of the Japanese Code means, and,
17 with all due respect to Mr. Reif's ability to research
18 foreign law, whatever he knows that to mean -- but
19 I've seen no indication, whatsoever, in either one
20 of the probabilities --

21 THE COURT: Is either one of the defendants
22 a citizen of Japan?

23 MR. LEVIN-EPSTEIN: To my knowledge, both are
24 American citizens.

25 MR. REIF: Yes, both are American citizens.

1 Mr. Yanagita was born in Japan, but is an American
2 citizen.

3 THE COURT: Naturalized American citizen?

4 MR. REIF: I believe one of his parents were
5 Japanese and one was American.

6 THE COURT: Although born in Japan, he was,
7 from birth, a citizen of the United States.

8 MR. REIF: Yes, that is my understanding, sir.

9 MR. LEVIN: And to follow through with
10 the Court's point, by way of footnote, could not be
11 deported to Japan, in that sense, extradition being
12 another matter, but he couldn't be deported in that
13 event.

14 There's been no showing that the Government
15 of Japan is interested in them, in any respect what-
16 soever.

17 So far as the so-called test that Mr. Reif
18 suggests, the Government has conceded the so-called
19 "realistic possibility test," which, by the way,
20 the Government does not concede is the test. For the
21 record, there is no realistic possibility that the
22 testimony to be elicited from either of these people
23 would have been used in Japan in a criminal prosecu-
24 tion.

The real test which comes by the way from

1 cases relied upon by the defendants is the real
2 likelihood, the probability, not so much a possibility,
3 because, in fact, that's the logical response.

4 If it were merely a possibility, then, I
5 submit, then every time we had a witness called to
6 testify in any case, almost every case in the Federal
7 Court where there might be some connection to some
8 foreign jurisdiction in some way, there would be this
9 claim.

10 In fact, even the Supreme Court of the United
11 States does not recognize, in domestic prosecution,
12 the mere possibility of a link. There has to be
13 some provable likelihood or some realistic likelihood.
14 There has to be a link forged in connection with
15 an incrimination. You can't simply walk up to a
16 witness stand and say, "I plead the Fifth Amendment,"
17 without something more being involved, and so it should
18 be.

19 In any event, Mr. Reif, very, very glibly
20 skips over the likelihood of the possibility of the
21 testimony, or while it's being elicited, being sealed
22 or being taken in camera, both, by the way, suggestions
23 that were made in the court in Tierney, which Mr. Reif
24 has announced he was one of the counsel. Be that as
25 it may, Judge Mishler offered to seal the testimony

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1 at the first trial, whereby Mr. Reif also represented
2 Mr. Yanagita. It wasn't necessary at that trial,
3 because there was a stipulation and Mr. Yanagita was
4 never called to testify before the jury.

5 The likelihood or the possibility of it
6 happening at the second trial was also raised, but
7 I submit to the Court it was reasonable only on the
8 part of Judge Mishler not to pursue that for two
9 reasons. First of all, because he determined, as a
10 decision of law, that it wasn't necessary for the
11 other reasons; secondly, that because from his
12 colloquy with the defendant on the witness stand,
13 during the back-and-forth questioning and answers,
14 that they did answer, it was very clear, and I don't
15 have the citations at my fingertips now, but I believe
16 the record will bear me out substantially -- in any
17 event, both defendants on advice of counsel, indicated
18 to Judge Mishler they were not going to answer any
19 questions, under any circumstances.

20 I think it would be fair, although I can't
21 read Judge Mishler's mind, and I admit if such a word
22 is correct, in this context, that it is not part of
23 the specific and explicit record that Judge Mishler
24 didn't so find, that he wasn't going to do it, but
25 I think Judge Mishler could have reasonably thought

1 that, no matter what he did, in terms of prophylaxis,
2 in terms of protecting the record in use of a foreign
3 jurisdiction, that they weren't going to answer
4 any questions, they just weren't going to do it.

5 I think most interesting, your Honor, and
6 perhaps dispositive of the entire matter, was the
7 fact that nothing, and I stress this, because Judge
8 Mishler requested of the Government an offer of proof
9 on the point, and I so represented at that proceeding,
10 nothing that was to be elicited from Mr. Yanagita was
11 not already fully known and made a public record in
12 that trial.

13 (Continued on next page.)
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1 MR. LEVIN-EPSTEIN: (continuing) The Government
2 represented to the Court, and will so represent to
3 this Court now that the Government was in the
4 possession of a signed, sworn statement by Michael
5 Kazuo Yanagita; that statment contained certain
6 information, and for want of a better word, in this
7 context, evidence, and that was the sole material that
8 theGovernment sought to elicit from Mr. Yanagita on the
9 witness stand. I so represented that to the Court;
10 the Court so made such a finding, and, in fact, that's
11 why and that's how we could eventually stipulate to
12 that statement into evidence instead of having Yanagita
13 testify.

14 THE COURT: At the first trial?

15 MR. LEVIN-EPSTEIN: I beg your pardon?

16 THE COURT: At the first trial?

17 MR. LEVIN-EPSTEIN: Yes. For tactical reasons,
18 which I don't believe are relevant here, such a
19 stipulation was not suitable at the second proceeding.

20 In any event, it is incredulous for Mr. Yanagita
21 or his attorney on his behalf to now suggest he would
22 have incriminated himself out of his own mouth with
23 matters we already knew about and were public record.
24 What could he have possibly said on the witness stand,
25 which, if they wanted to the prosecutor in Japan

2 1 couldn't obtain by looking in the Court file. It was
2 out in the open.

3 As to Mr. Kondo, it's true Mr. Kondo didn't
4 make out a signed, sworn statement, but the evidence
5 that related to Mr. Kondo, as to the firearms that
6 Mr. Kondo distributed to the female defendant, Miss
7 Young, was all documented; there were disposition
8 slips, there was a so-called 4473 form where the firearm
9 was actually purchased from the gun shop in California
10 by Kondo, all circumstances upon which Mr. Kondo would
11 have been cross-examined -- well, I started to say
12 cross-examined, in fact, he would have been cross-
13 examined in retrospect, because he would have been a
14 hostile witness, but I meant to say examined, but it
15 was clearly there, if they had wanted to, the prosecu-
16 torial army in Japan had the same material at its
17 beck and call as I did and as the United States
18 Government, without ever having heard one word uttered
19 from them on the witness stand, because this is a
20 specious argument, clearly, because they wouldn't have
21 done anything more than we would have known already.

22 It might be argued, in rebuttal, that the
23 Government might well have, through clever cross-
24 examination, elicited from Mr. Kondo matters not
25 contained from this evidence or matters not contained

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1 in Mr. Yanagita's statement. Possibly so, because
2 Judge Mishler indicated he would sustain objections to
3 anything outside of the scope of these matters, so I
4 wouldn't have been able to do that either.

5 Your Honor, quite frankly, I don't know whether
6 or not the assassination of His Imperial Highness, the
7 Emperor on American soil would constitute a violation
8 of Japanese law. Maybe it would, but I don't know.
9 There's been no showing that it would here, except for
10 speculation, which is the best word I can think of.

11 This, by the way, should not be taken by the
12 Court as a suggestion implicit or otherwise by the
13 United States that the attempted murderer or the
14 conspiracy to murder or even the hypothetical specula-
15 tion of plans or conjecture to murder a human being,
16 or whether he be an emperor or a convicted murderer
17 himself, is not a heinous relation as to the law, both
18 man and moral, but that's not the issue. The issue is
19 whether or not this testimony would have subjected
20 them to prosecution and would have been incriminating
21 in such a prosecution in Japan, and that's not reached --

22 THE COURT: It certainly would have been first
23 degree murder in whatever state it occurred in.

24 MR. LEVIN-EPSTEIN: Hypothetically, let's take
25 it to its logical conclusion; New York State conspiracy

1 to murder a human being, if taken to its fruition
2 would be murder in the first degree and would be
3 punishable, if I recall by life imprisonment --

4 THE COURT: Twenty five to life.

5 MR. LEVIN-EPSTEIN: Then the Court is more
6 versed in McKinney's statute --

7 THE COURT: The Crimmins case.

8 MR. LEVIN-EPSTEIN: Clearly, it's a vicious
9 crime, if it were to occur.

10 THE COURT: Suppose the question is whether the
11 Japanese code would be considered addressed to a non-
12 Japanese national, with respect to offenses outside
13 of Japan.

14 MR. LEVIN-EPSTEIN: Exactly. Suppose a man
15 who is just an ordinary citizen of Japan, on tour in
16 the United States as a tourist is shot and killed
17 during the course of a street robbery. Now, would
18 the murderer here be subject to prosecution in Japan?

19 THE COURT: I don't know.

20 MR. LEVIN-EPSTEIN: Neither do I and, I submit,
21 your Honor, neither does Mr. Reif.

22 THE COURT: I think if he went to Japan he
23 might be.

24 MR. LEVIN-EPSTEIN: He might be. Again, I
25 don't know, but as long as Mr. Reif is relying on

5 1 American law as his analogy, I am not exactly sure if
2 an American citizen were traveling in France and a
3 Frenchman killed that American citizen in the street,
4 during the course of a robbery, if that French citizen
5 could be prosecuted, could be prosecuted in New York.
6 He might well be prosecuted in Federal Court. I don't
7 know. There might be some extra territoriality if
8 certain basic requirements were filled, but I don't
9 know.

10 I think I've said enough on that point, unless
11 the Court wishes something further on that matter.

12 THE COURT: I take it there are cases, as long
13 as your arm, settling the point.

14 MR. LEVIN-EPSTEIN: I don't believe as long as
15 my arm, but I think that the cases are pretty clear.

16 The Cardoza case is cited --

17 THE COURT: No, cases that say that there is no --
18 that you do know that Section 6003 does not have to
19 protect --

20 MR. LEVIN-EPSTEIN: I'm aware of no such case --
21 in the sense I'm aware of no such case that says the
22 immunity granted by a Federal district judge protects
23 a foreign --

24 THE COURT: Must protect --

25 MR. LEVIN-EPSTEIN: (continuing) protects a

1 foreign national or even an American national from a
2 foreign prosecution, but I was able to find no cases
3 on point to where the facts were even substantially the
4 same as this one, where such a thing could be reached.

5 In other words, I don't see how a case could
6 have been decided where a Court of Appeals would have
7 entertained speculation upon speculation.

8 In other words, a Court of Appeals would have
9 had to decide that a person who might be connected to
10 an aborted speculated attempt to assassinate a foreign
11 national, who might come within some interpreted
12 section of a foreign code, at a certain point, your
13 Honor, it becomes sophistication upon sophistication
14 and speculation upon speculation.

15 THE COURT: You mean they talk about the
16 probability? What I'm talking about is the abstract
17 proposition, and defense counsel has suggested the
18 case in the Supreme Court of the United States, which
19 suggests that being subject to prosecution in England
20 will do.

21 MR. LEVIN-EPSTEIN: Zicarelli --

22 THE COURT: Whatever it was that way or the
23 other way. It doesn't really much matter -- that the
24 Court indicated a proposal of the English Court, which
25 accorded a man immunity, where he said he might testify,

7 1 if subject to prosecution in the United States.

2 Now, he said they had approved that in something
3 against the waterfront --

4 MR. LEVIN-EPSTEIN: I'm not sure they approved
5 it in Murphy versus Waterfront Commission. Again, this
6 is the type of argument --

7 THE COURT: I take it in Murphy against
8 Waterfront, it was thought it was the Federal power to
9 compel that would protect against state prosecution.

10 Now, what did they precisely hold in Murphy
11 against Waterfront, which was not the Federal power --

12 MR. LEVIN-EPSTEIN: I don't believe they
13 addressed themselves to that point.

14 As far as Murphy versus Waterfront Commission,
15 I think your Honor has expressed the whole thing
16 precisely; Federal immunity will protect against the
17 State prosecution for the same events, but I can't
18 imagine -- let me strike that, because, of course,
19 anything is possible. I don't believe that the Court
20 in Murphy addressed itself to what the Federal
21 Government was not empowered to do, because that,
22 itself, would have been a speculation.

23 Perhaps, I don't understand the Court's question.

24 THE COURT: I want to know what the precise
25 holding was in Murphy versus Waterfront Commission.

1 MR. LEVIN-EPSTEIN: I believe the precise
2 holding was if somebody is granted immunity at the --
3 in the Federal Government, that immunity will stand in
4 good stead.

5 THE COURT: The Federal Government was the
6 party?

7 MR. LEVIN-EPSTEIN: It was in inter-jurisdictional
8 lines. You can't be compelled to answer a question
9 that might be involved in a jurisdiction, but I don't
10 believe it goes into the international lines.

11 THE COURT: It's not quite that.

12 MR. LEVIN-EPSTEIN: I'm not articulate with
13 that, but I'm afraid I don't understand the Court's
14 precise question.

15 THE COURT: I'll have to refresh my recollection
16 about the case.

17 MR. LEVIN-EPSTEIN: As far as the electronics
18 surveillance, do you wish anything further on the
19 self incrimination?

20 As far as the electronic surveillance point is
21 concerned, the Government, first of all, would remind
22 the Court, respectfully of a factual finding that
23 Judge Mishler made, that the motion was brought in
24 bad faith; whether that's based upon an evaluation of
25 the time sequence or it's based upon Judge Mishler's

1 prior understanding of what happened in the first
2 trial. That's a matter within Judge Mishler -- I
3 can't speculate upon that. I think it's significant
4 to note Mr. Yanagita was Mr. Reif's client weeks and
5 weeks before this motion was brought, and if Mr. Reif
6 was assiduous enough to inquire of Mr. Kondo as to the
7 possibility of strange things happening on his telephone --
8 I can't imagine him not being as zealous with Mr.
9 Yanagita months before, and suddenly coming to this
10 realization. It might be a good motion to make on the
11 eve of trial, and if the motion, in fact, was only
12 coming to his attention on that Friday, I can represent
13 to the Court I received no telephone call on Friday
14 indicating that the possibility of such a motion
15 coming. Apparently Judge Mishler's chambers received
16 no indication that such a motion was forthcoming and
17 no representation has been made by my opponent that
18 any such attempt to notify counsel for the Government
19 or the Court was made.

20 I don't believe that goes to the merits of
21 the issue and I don't argue it for that point, but
22 so long as Mr. Reif raised it, I feel compelled to
23 respond, but as far as whether or not the Government
24 responded to the motion once it was made, I think
25 that an adequate response was made.

1 When I found out that the motion was being
2 made, I made the only response that I could make --
3 when I say I, I mean personally, of course, I didn't
4 know of any electronic surveillance involving Yanagita
5 or Kondo. I offered to make that under oath; Mr. Reif
6 indicated that wasn't necessary.

7 I conferred, at Judge Mishler's instructions,
8 with Mr. Patterson of our office, who, at that time
9 was the chief of the General Crime Section and, quite
10 frankly more experienced in the area of so-called
11 agency checks than I. He indicated to the Court when
12 he came down, it was his experience that the entire
13 procedure was done through a written letter, written
14 colloquy between agencies and that inquiry was made
15 and checks were made and responses were made and
16 reports were made to the Court and so on.

17 I don't know what Mr. Reif's experience in the
18 area was, your Honor. Quite frankly, I prefer to rely
19 on what people who are close to that procedure tell me.

20 In any event, Mr. Patterson did make inquiry
21 on that very day, at Judge Mishler's instructions, of
22 the agency that was specifically involved in the
23 prosecution, the Bureau of Alcohol, Tobacco and
24 Firearms, an adjunct agency of the United States
25 Department of Treasury and by way of affidavit by

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Mr. Pearson indicated to the Court he and the ATF people were aware of no way of any electronic surveillance on Yanagita and Kondo; no inquiry was made -- not made of the FBI, nor was inquiry made of the Secret Service; nor was inquiry made of the Selected Service; nor any of the other agencies, but the reason for inquiry not being made there, because there was no necessity for inquiry to be made there. It's submitted that the case law, particularly the Grusse case clearly states this was an adequate response, and I'm not going to belabor this record by again going through what this response was or what the holding in Grusse was. We responded by saying, basically, we weren't aware of any electronic surveillance or wiretapping surveillance.

As far as the electronic surveillance response goes, the same issue, by the way, was raised in Tierney and the Court there, with exactly and precisely the same argument being raised by counsel for the witnesses in that Grand Jury related case found that an adequate response had been made. In fact, it turned out that there had been an "overhearing" as characterized by the Court.

In the Tierney case, and that, by the way, is a reference in Defendant's Memorandum of Law, where

MEMORANDUM

Mr. Reif indicates the Government had to "recant" its original representation, I submit, your Honor, that no such recantation ever occurred, but rather that a reading of Tierney clearly shows the Court was told by the discovered overhearing, after the District Court proceeding was terminated and before the Court of Appeals proceeding occurred, and that the Government provided to the Court of Appeals the actual overhearing, and, I believe, although I'm not sure, a transcript of that overheard conversation -- and the Court of Appeals listened to it and made a specific determination that it was absolutely irrelevant to the matter, and despite that, notwithstanding that subsequent overhearing, an adequate response had been made at the time.

Point four in the Defendant's Memorandum of Law is that the authorization for the Government to apply to Judge Mishler for immunity for the two defendants was improperly obtained and therefore, there was no immunity, and therefore, I assume, as might follow today, they had no obligation to answer, and therefore, again, logically, they couldn't have been held in contempt, and for that reason this case should be dismissed as well.

By way of a footnote, again, it's almost ironic

1 that Mr. Keoch, who was the Deputy Assistant Attorney
2 General involved in this matter was Mr. Reif's
3 opponent in Tierney, where the same issue was raised
4 and disposed of in favor of the Government's position
5 here.

6 Mr. Keoch is the Deputy Assistant Attorney
7 General in the United States, in the Department of
8 Justice; his immediate superior is Mr. Tierney, unless
9 a Deputy Assistant Attorney General, Mr. Keeney whose
10 immediate superior is Mr. Thornburgh, the Assistant
11 Attorney General in charge of the Criminal Division
12 of the United States Department of Justice.

13 By the very argument that Mr. Reif makes with
14 respect to the various codes of Federal Regulations,
15 the sections which I'm not going to read again into
16 the record, when Mr. Thornburgh is out of town, meaning
17 Washington, Mr. Keeney takes over for the purposes of
18 immunity, not for the purposes of wiretapping and not
19 for the purposes of electronic surveillance. That's
20 quite frankly not a very good analogy, because there,
21 as Giordano so specifically illustrated to us, is a
22 very specific kind of authorization, but this is
23 immunity, the interest to be served is different, but
24 be that as it may, when Mr. Thornburgh is out of town,
25 Mr. Keeney takes over; in the unlikely event Mr. Keeney

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1 is out of town, Mr. Keoch takes over. By the way,
2 it's been represented to me, I have no reason to doubt
3 it by attorneys in the Department of Justice, if Mr.
4 Keoch were out of town on the same day that this case
5 took place, June the 18th, 1976, there was a third
6 Deputy Assistant Attorney General behind Mr. Keoch,
7 who would have taken over to sign an immunity
8 authorization.

9 Whether or not the guideline or procedure that's
10 spoken of in Tierney is the code of Federal Regulations
11 or not, it's interesting and it's helpful, I believe,
12 to the Court to recognize that the so-called guidelines,
13 the so-called --

14 THE COURT: Isn't this a little different from
15 the other point of view that certainly the Government
16 could not, very well offer this testimony in evidence,
17 if it got it against either the men by arguing that
18 the grant of immunity was unauthorized?

19 MR. LEVIN-EPSTEIN: If the grant of immunity
20 were unauthorized, I think there are two responses to
21 that question, your Honor:

22 Number one, I don't subscribe to Mr. Reif's
23 argument that a judge cannot grant immunity sua sponte.

24 THE COURT: I don't know anything about that.
25 What I'm talking about is here ordinarily you can --

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1 MR. LEVIN-EPSTEIN: I didn't hear you.

2 THE COURT: Ordinarily, you cannot estop the
3 Government. Certainly, just because it does something
4 the wrong way --

5 MR. LEVIN-EPSTEIN: Exactly.

6 THE COURT: Now, does that mean, suppose these
7 men had acted and relied upon the immunity, could they,
8 if thereafter indicted for some connected offense, if
9 it was offered against them, the testimony which they
10 gave in the Chin trial --

11 MR. LEVIN-EPSTEIN: Of course not.

12 THE COURT: Why not?

13 MR. LEVIN-EPSTEIN: Because it's just not fair,
14 in simple language. If the Government --

15 THE COURT: In other words, you're saying
16 because the Government is estopped?

17 MR. LEVIN-EPSTEIN: In a situation of that
18 type --

19 THE COURT: Isn't it because the order is
20 valid, whether or not erroneous --

21 MR. LEVIN-EPSTEIN: Exactly.

22 THE COURT: It seems to me the order might be
23 erroneous if the Court was misled and there was a
24 motion to set aside, a motion to set aside, I think
25 there is implicit in every one of these letters that's

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1 next to a set of 6003 motion papers, ex parte a
2 motion papers, a representation of delegational
3 regularity --

4 MR. LEVIN-EPSTEIN: Exactly.

5 THE COURT: (continuing) the Judge doesn't
6 have to acquire; all procedure would be arrested if
7 one had to do that.

8 I didn't ask Mr. Reif or Miss Gladstein whether
9 they were admitted to practice in this Court --

10 MR. LEVIN-EPSTEIN: Exactly.

11 THE COURT: The fact that they rose in Court
12 was a representation to me that they were. The
13 presentation of such letter to the Court is a repre-
14 sentation of authority upon which the Court acts, and
15 I think that the order then made is a valid order,
16 but, largely because I confer immunity, it's a grant,
17 it's not a deprivation, it's a grant. A wiretap order
18 is an invasion, it seeks to authorize what would
19 otherwise be a trespass upon right.

20 Here you have a grant of immunity, which
21 authorizes the witness to testify and immunizes him
22 against the use of that testimony or anything that's
23 used against him.

24 You'd have a pretty question here, whether it
25 would authorize a man who had signed the statement --

1 MR. LEVIN-EPSTEIN: In fact, I guess, even
2 further than that --

3 THE COURT: (continuing) It would have pre-
4 vented it being used against him, even though already
5 known to the Government before the authorization was
6 granted and similarly so as to Mr. -- the second named
7 defendant --

8 MR. LEVIN-EPSTEIN: Kondo.

9 THE COURT: (continuing) Kondo, with his
10 papers.

11 MR. LEVIN-EPSTEIN: You know, it's interesting,
12 your Honor, but taken to its logical --

13 THE COURT: Is that part of it?

14 MR. LEVIN-EPSTEIN: I'm sorry.

15 THE COURT: Where does the old John L. Lewis
16 (ph) fit in all this?

17 MR. LEVIN-EPSTEIN: I'm not familiar with
18 that.

19 THE COURT: You have a very famous case. I
20 thought all you people knew that one.

21 They made an order against John L. Lewis, and
22 when it got to the Supreme Court, the Supreme Court
23 said it was an outrageous order; it should never have
24 been made against him.

25 In the meantime he disobeyed it. It's still

1 contempt of Court, even though the order should never
2 have been made, and when it did reach the Court on
3 the merits, it was thrown out. I don't know whether
4 it was thrown out on jurisdictional grounds or what-
5 ever, I forgot, it's too long ago.

6 However, isn't there something of that in this
7 case; that if an order has been made, it must be
8 obeyed, even though erroneous?

9 MR. LEVIN-EPSTEIN: It even goes further than
10 that, your Honor.

11 THE COURT: You see here, as I understand it,
12 although it doesn't usually work too well, Judge
13 Mishler attempted to give the defendants an opportunity
14 to have his order reviewed. I take it that really
15 didn't work.

16 MR. LEVIN-EPSTEIN: In fact, Judge Mishler,
17 after holding them in contempt, ordered me to prepare
18 an order of commitment.

19 In fact, he ordered Mr. Reif to prepare,
20 immediately an appeal of that order to the Court of
21 Appeals on a stay of execution of the sentence or an
22 order remanding the two defendants.

23 Judge Mansfield eventually did hear that
24 matter or reviewed it, did hear it by oral argument
25 on the 23rd and denied it, so there was an appeal.

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1 THE COURT: Without opinion?

2 MR. LEVIN-EPSTEIN: Yes, without opinion.

3 THE COURT: So that you can't spell much out
4 of that, but was a notice of appeal filed?

5 MR. REIF: Yes, sir.

6 THE COURT: Was it ever prosecuted?

7 MR. REIF: No, your Honor.

8 Mr. Levin-Epstein and I conversed about that on
9 the phone in the last several days, and there is
10 pending in the Court of Appeals a motion to voluntarily
11 dismiss the appeal.

12 THE COURT: Well, let me say this: you see, it
13 is that very order which underlies the present
14 prosecution and that prevents it from being mooted,
15 it seems to me, doesn't it?

16 MR. REIF: I don't -- let me explain
17 it this way, your Honor: I don't believe that the
18 appeal from the first contempt is now moot and I've
19 had this decision at some length with Mr. Levin-
20 Epstein.

21 MR. LEVIN-EPSTEIN: We're of a different
22 opinion, by the way, your Honor.

23 MR. REIF: I don't believe the appeal is moot
24 as a matter of law.

25 However, I've consulted with Mr. Yanagita and

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1 Mr. Kondo and it's their desire not to pursue the
2 appeal, even though I've advised them that it is my
3 view that it's not moot as a matter of law. So, we
4 have filed a motion, pursuant to I think it's Rule 42
5 of the Federal Rules of Appellate Procedure to
6 voluntarily dismiss the appeal, and that motion is
7 pending in the Court of Appeals.

8 THE COURT: Well, that bothers me very much,
9 because it seems that if the -- if the commitment
10 order, which really has no significance except that it
11 is an order, so to speak, unless you're right on the
12 other points, if that order is in full force and
13 effect and unreversed and not on appeal, don't you
14 get into the situation of the Lewis case that I
15 referred to, it being an order which has been
16 disobeyed?

17 Now, of course, it wasn't the commitment order
18 precisely that was disobeyed.

19 MR. LEVIN-EPSTEIN: It was the order to testify.

20 THE COURT: The order to testify, but the
21 commitment order really has no life, except it is a
22 facet of that order.

23 MR. REIF: If I can be heard on that, your
24 Honor.

25 THE COURT: Was there an order that was a

1 written order to testify?

2 MR. LEVIN-EPSTEIN: No, your Honor.

3 THE COURT: Well, I thought on 6003 orders,
4 they're usually written orders.

5 MR. LEVIN-EPSTEIN: Let me just think --

6 MR. REIF: Your Honor, the order as to Mr.
7 Yanagita was written; the order as to Mr. Kondo was
8 not.

9 In fact, we objected to that, because although
10 there was no formal application, all there was was a
11 presentation of the teller copy letter of Mr. Keoch
12 to the Court; the Court orally entered the order, and
13 there was no formal written order.

14 MR. LEVIN-EPSTEIN: Let me take issue with that.
15 There was an order as to Mr. Yanagita, it was written;
16 as to Mr. Kondo, it was oral and direct, but there
17 was certainly formal application to the grant of
18 immunity. There was nothing like that in the record.
19 This was not something that Judge Mishler took upon
20 himself in receipt of certain papers.

21 THE COURT: What is it you appealed from?

22 MR. REIF: Sir?

23 THE COURT: What did you appeal from?

24 The commitment order, which really brought up
25 for review the validity of the order to testify; didn't

1 you appeal --

2 MR. REIF: That's correct.

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3 THE COURT: Because, apart from that, you
4 couldn't criticize the order.

5 MR. REIF: If I could be heard --

6 THE COURT: It really was an appeal from the
7 order to testify.

8 MR. REIF: It was an appeal from the commitment
9 order for refusing to obey the order to testify.

10 THE COURT: So it brought up, and so far as it
11 was a commitment order, it was completely without sin,
12 except to the extent that the underlying order to
13 testify was invalid.

14 MR. REIF: Let me try to clarify this. I
15 think there's a confusion --

16 THE COURT: I'm not confused now. Don't you
17 try to confuse me or confuse yourself.

18 What I'm after is this: Hadn't you damn well
19 better withdraw your withdrawal of your appeal before
20 you get into an impossible bind of having, in effect
21 against you an order -- against your man, a valid
22 order to testify, which is in full force and effect
23 an unreversed, despite the fact that an appeal was
24 taken from each of them in the only way possible, by
25 appealing from the commitment which had no foundation

1 except these orders.

2 MR. LEVIN-EPSTEIN: Couldn't it be argued,
3 your Honor, that once the Court of Appeals made a
4 determination or Justice Mansfield made a determination --

5 THE COURT: Judge Mansfield.

6 MR. LEVIN-EPSTEIN: I'm sorry, Judge Mansfield.

7 THE COURT: I think he'd be willing to accept
8 your promotion --

9 MR. LEVIN-EPSTEIN: (continuing) like immunity,
10 it's not within my power to grant; wouldn't it be also
11 arguable, your Honor, that Judge Mansfield in denying
12 the appeal made --

13 THE COURT: A mistake? No.

14 MR. LEVIN-EPSTEIN: (continuing) In denying
15 the stay made a determination on the merits?

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17 (Continued on next page)
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1 THE COURT: I don't think so, because I don't
2 think even Judge Mansfield can affirm or reverse a
3 District Court order. All he can do is refuse relief,
4 which rightly or wrongly is regarded as extraordinary.
5 I take it, if I can guess that his feeling was that this
6 will -- if I try to act on this now, it will completely
7 destroy any chance of the man testifying during the
8 trial and the trial wouldn't be over; double-jeopardy
9 will attach to the people in that case and --

10 MR. LEVIN-EPSTEIN: It's not worthy, on the same
11 day Judge Mansfield denied Mrs. Peal's order or to
12 reverse Judge Mishler's denial for the stay of trial,
13 he wouldn't put this over --

14 THE COURT: Was Mrs. Peal in this case, too?

15 MR. LEVIN-EPSTEIN: Oh, yes, your Honor.

16 THE COURT: It would be fun, she's fun to work
17 against.

18 MR. REIF: If I can be heard, I think the case
19 which your Honor is referring to is United States
20 against United Mine Workers, which was decided in 1947,
21 the doctrine set forth is what is known as the invulner-
22 able, which was later affirmed in Supreme Court in Walker
23 against Birmingham; the principle in that case is when
24 there's an order outstanding, if there is an opportunity
25 to appeal the entering of the order, then that must be

1
2 done before the order is disobeyed, otherwise the order
3 is said to be invulnerable from attack, by way of defense
4 to a charge of contempt for violating the order, and
5 that exists only in a situation where there is an
6 opportunity to appeal the order before the person has to
7 violate it or comply with it.

8 Now, in this particular case, there is no
9 opportunity to appeal from the entry of the order to
10 testify prior to -- either following the order or dis-
11 obeying the order. The reason for that is that the
12 rule of law is that there is no interlocutory appeal
13 from entry of an order to testify in an ongoing proceed-
14 ing. That's a well-established principle.

15 The DiMauro case, which we cite in our brief,
16 United States against DiMauro addresses precisely this
17 question which the Government made some sort of conten-
18 tion that the order to testify in that case was invul-
19 nerable to attack as a defense in a charge of contempt,
20 because there had been no appeal from the underlying
21 order; the Eighth Circuit projects that argument and
22 says that the invulnerable doctrine, the Mine Workers
23 case and Walker against the City of Birmingham does not
24 apply where the situation is an order to testify in a
25 proceeding, because there is no opportunity to appeal,
and, therefore, the way the witness obtained review is

3 1 disobeying the order and appealing from a contempt judg-
2 ment. I think this case is distinguishable and has,
3 as a matter of law, been distinguished in the DiMaure
4 case.

5 THE COURT: He had already disobeyed in this
6 case and he had filed an appeal.

7 MR. REIF: Sir, the charge in this case is separ-
8 ate from the charge in the first contempt. We're not
9 seeking review in this case of the initial charge. The
10 initial charge happened and is over with. This is a
11 separate charge brought by the Government --

12 THE COURT That's not your point number one.

13 MR. REIF: Excuse me.

14 THE COURT: That's not your point one.

15 MR. REIF: No, I'm saying it's two separate
16 contempts. This particular case involves the second
17 contempt.

18 THE COURT: No.

19 MR. LEVIN-EPSTEIN: If Counsel is willing to
20 stipulate to that --

21 THE COURT: No, that's not true and you argued
22 that, I think, what's fundamental to your case seems to
23 me quite an opposite argument, and that is that this is
24 the same contempt. There is only one contempt, refusal
25 to testify.

1 MR. REIF: That's correct, your Honor.

2 THE COURT: Now, he was committed for that
3 contempt, treated as a civil contempt.

4 Well, let's go back. There was one disobedience;
5 that disobedience has two facets. It was possibly a
6 criminal contempt. It was held to be a civil contempt.

7 Whether or not it was a civil contempt depends
8 upon the validity of the direction to testify.

9 In other words, as to whether his disobedience
10 was legitimate or not.

11 Your contention, being that his disobedience was
12 the lawful exercise of the lawful right.

13 Now, for that, a mandatory and appealable order
14 had been entered, treating him as in a civil contempt
15 and incarcerating him until the trial ended, or he
16 answered or a month had expired. That was appealed.

17 Now, underlying or springing out of the same act
18 of disobedience, in the second aspect, it was a violation
19 -- it was such a contempt as the Court still has the
20 power to punish by virtue of 18 USC, Section 401. 401
21 doesn't define the contempt nor does it touch on the
22 penalty, but it does indicate, that's been taken to
23 establish that the inherent power of the Court to punish
24 for criminal contempt is preserved and that cases only
25 are found in section 401. It still doesn't help us too

much.

The Supreme Court has to piece out the contempt laws, but that is still the same act of disobedience and there is no unlawful disobedience if the order is invalid. The order to testify is invalid. Everything that you have said here has been a challenge to the order to testify and that, I think, is what's up for review in the Court of Appeals, because your arguments are all addressed to whether Judge Mishler could have made that argument, should have made that order or should have rejected it or should have set it aside when you presented to him these various arguments.

I take it the only one that wasn't presented to him was the one based on Keeney's signature.

MR. REIF: Yes, sir.

THE COURT: That was based --

MR. REIF: No, it was not presented either to Judge Mishler or Mansfield because we didn't have the document at the time. We never got the copy of the letter from Mr. Keoch until after the proceedings.

THE COURT: It should have been under Yanagita's order.

MR. REIF: Mr. Yanagita's order, your Honor, was authorized by Mr. Thornburgh.

THE COURT: Only Kondo's was authorized by Keogh?

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MR. LEVIN-EPSTEIN: Mr. Thornburgh had left town in the meantime for the day.

MR. REIF: In response to the issue your Honor is raising, there is no dispute that the two charges are based upon the same refusal to testify. There's no dispute as to that.

THE COURT: All right, then, proceed.

MR. REIF: The only point I was making, there are two separate proceedings.

THE COURT: If you want to dismiss your appeal, proceed.

MR. LEVIN-EPSTEIN: Your Honor, I think we've pretty much covered all the issues raised by defendant's memorandum of law.

As far as the guidelines themselves are concerned, I believe they were complied with, so I think that should not be an issue.

I think Mr. Keoch was authorized to be the acting assistant Attorney General on that day, pursuant to the regulation and pursuant to Mr. Keoch's properly obtained authorization, a motion was made and immunity was granted, an order was valid. They had a direct order to testify, which both of them declined to follow, and that's the long and short of it.

I believe, your Honor, if I can respond to any-

1 thing specific, I'll try to, but I believe that nothing
2 further would be hazarded by any more -- off the top
3 of my head -- talking at this point, quite frankly.

4 THE COURT: All right.

5 When is our trial date?

6 MR. LEVIN-EPSTIEN: I believe the 23rd or the
7 week of the 23rd. Is that correct, Mr. Reif?

8 MR. REIF: Yes, sir.

9 THE COURT: I'll get it decided in time for that.

10 Now, if those two informations have to be
11 dismissed, then they are appealable, and I am concerned,
12 I wish you wouldn't dismiss that.

13 MR. REIF: If I can just be heard on that point.

14 THE COURT: No, you can't.

15 I will decide the case as quickly as I can, of
16 course.

17 I have nothing else to do, naturally, that's why
18 I am here at 18 minutes to 7, or whatever it is.

19 MR. LEVIN-EPSTEIN: I'm sure both parties recog-
20 nize and appreciate the Court's staying this late day.

21 THE COURT: If I decide that I must dismiss the
22 information, I would hate to have the case on appeal go
23 off on the grounds that the dismissal of the appeal
24 handed the case to the Government.

25 MR. LEVIN-EPSTEIN: I'm not sure I follow your

Honor.

THE COURT: That the dismissal of the earlier appeals made everything hunky-dory.

MR. LEVIN-EPSTEIN: I have to confess, your Honor, I'm a little confused.

THE COURT: If I dismiss these informations and you appeal them --

MR. LEVIN-EPSTEIN: The Government appeals?

THE COURT: The Government appeals.

The Government might prevail, for the simple reason that the appeal from the earlier orders had been dismissed voluntarily, thus leaving no block to the root and branch and enforcement of the underlying orders to testify, since Counsel has demonstrated their appealability by appealing.

MR. LEVIN-EPSTEIN: And then withdrawing it.

THE COURT: The appeal is not moot, because of the tendency of the information, and, therefore -- so, all I'm saying is if I were representing your client, I would not dismiss my appeal, I'd drag my feet.

MR. LEVIN-EPSTEIN: Good evening, your Honor.

COTTON CLOTHING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, now
known as Elizabeth Jane
Young Chin,

75 CR 851 (s) -

Defendants;

APPLICATION OF MARC KONDO.

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MOTION OF MARC KONDO RE ELECTRONIC SURVEILLANCE

Upon the affidavit of Marc Kondo annexed hereto and all the proceedings heretofore had herein, and pursuant to Title 18 U.S.C. Sections 2515, 2518 and 3504 and the Fourth Amendment to the U.S. Constitution, MARC KONDO respectfully moves this Court for:

(a) entry of an order requiring the government to affirm or deny whether it or persons acting in conjunction with it or on its behalf has/have conducted electronic surveillance of said Marc Kondo or his premises at 4547 Pickford Street, Los Angeles, California; and

(b) an adversary hearing to determine the legality of such electronic surveillance and to determine whether such surveillance has lead to Kondo being called as a government witness herein or formed the basis of questions to be asked him.

Dated: Brooklyn, New York
June 21, 1976

James Reif
JAMES REIF
AMY GLADSTEIN
Gladstein, Meyer & Reif
308 Livingston Street
Brooklyn, NY 11217
(212) 858-9131
Attorneys for Kondo

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : 75 CR 851 (s)

KENNETH RAYMOND CHIN, and : AFFIDAVIT
ELIZABETH JANE YOUNG, now :
known as "Elizabeth Jane :
Young Chin", :

Defendants; :

APPLICATION OF MARC KONDO. :

-----x

State of New York)
) ss:
County of Kings)

MARC KONDO, being duly sworn, deposes and says:

1. I have been subpoenaed by the prosecution to appear as a witness in the above-entitled case.
2. I live alone at 4547 Hickford Street, Los Angeles, California 90019. I have lived at that address for approximately two years.
3. During this period I have maintained a telephone at said address; the number is 213-939-1423.
4. Since the summer of 1975, I have encountered several unusual circumstances in trying to use my home telephone.
5. At least once a day I will dial a number but the phone will not ring at the number I am attempting to reach. When this occurs, I have to call an operator

and ask the operator to place the call for me.

6. On other occasions, when I have picked up the receiver, there has been no dial tone. When this has happened, I have often had to wait for a dial tone for between five minutes to half an hour.

7. Another difficulty is that my phone has gone "dead" while I am talking with people over it.

8. On other occasions I have heard voices other than that of the person I am speaking to and a sound which I would describe as that of a tape recorder running during telephone calls.

9. One day in approximately August or September 1975, when I was returning home, I noticed an individual under my house. This person was crawling out from under a grating which rims the bottom of the house in which my apartment is located. I questioned this person as to what he was doing. He said he was from the phone company and was under my house in order to fix my phone. He said he had fixed it, that the problem was loose connections, and then left. I had had no expectation or knowledge that a telephone repair man would be at my house on this occasion.

10. In November 1975, I was approached by an individual who identified himself as John Carencio, an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF). Carencio approached me while I was working on a car at my mother's house. He commented on the car and then said, "You're Marc, aren't you?" I said yes. Carencio identified himself to me at this point and asked me if I would get into his car to speak with him. I did this. Carencio

showed me a file which he said contained personal information about me. This particular information was matter which I had previously discussed in a telephone communication from my home with Elizabeth Jane Young Chin, a defendant herein, in August, 1975. I do not know of any way this information could have been obtained by the government except through electronic surveillance of that telephone conversation.

11. Carenco showed me a statement signed by Michael Yanagita and asked me to read it. He then asked me to give him a similar statement and sign it. He said if I did this and testified in court, I would be granted immunity from prosecution and would not have to worry about anything.

12. In addition I have had other telephone communications with Elizabeth Jane Young Chin from my home during the period July 29 - October 4, 1975, and otherwise, in which we discussed matters which are relevant to the indictment herein.

13. Based upon the foregoing, I believe I have been the subject of electronic surveillance, including surveillance of conversations I had had with Elizabeth Young Chin over my home phone concerning matter relevant to the instant case and matter which was in the file of the ATF Agent investigating this case. Upon information and belief, no judicial approval for such surveillance has been obtained and any such surveillance is unlawful.

14. I have been informed by James Reif, my attorney, that he has been told by Ethan Levin-Epstein, the Assistant U.S. Attorney in this case, that he has subpoenaed me to elicit testimony to the effect that I sold or gave to the defendants one or more of the firearms which are the subject matter of the indictment herein.

/s/
MARC KONDO

Sworn to before me
this day of June, 1976

Notary Public

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UNITED STATES OF AMERICA :

-against- :

75 CR 851 (s)

KENNETH RAYMOND CHIN, and :
ELIZABETH JANE YOUNG, now :
known as "Elizabeth Jane :
Young Chin", :

Defendants; :

Application of Michael Yanagita. :

----- -x
MOTION OF MICHAEL YANAGITA RE ELECTRONIC
SURVEILLANCE

Upon the affidavits of Michael Yanagita and Lilly Tanabe annexed hereto and all the proceedings heretofore had herein, and pursuant to Title 18 U.S.C. Sections 2515, 2518 and 3504 and the Fourth Amendment to the U.S. Constitution, MICHAEL YANAGITA respectfully moves this Court for:

- (a) entry of an order requiring the government to affirm or deny whether it or persons acting in conjunction with it or on its behalf has/have conducted electronic surveillance of said Michael Yanagita or his premises at 3506 South Bronson Avenue in Los Angeles, California; and
- (b) an adversary proceeding to determine the legality of such electronic surveillance and to determine whether such surveillance has lead to Yanagita being

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called as a government witness herein or formed the basis
of questions to be asked him.

Dated: Brooklyn, New York
June 21, 1976

James Reif

JAMES REIF
AMY GLADSTEIN
Gladstein, Meyer & Reif
308 Livingston St.
Brooklyn, N.Y. 11217
(212) 858-9131

Attorneys for Michael Yanagita

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

697

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UNITED STATES OF AMERICA :

- against - :

AFFIDAVIT

KENNETH RAYMOND CHIN, and :

75 CR 851 (s)

ELIZABETH JANE YOUNG, now :

known as Elizabeth Jane . . . :

Young Chin, :

Defendants; :

Application of Michael Yanagita. :

- - - - -x

State of New York)
) ss:
County of Kings)

MICHAEL YANAGITA, being duly sworn, deposes
and says:

1. I have been subpoenaed by the prosecution
to testify at the trial of the above-entitled case.
(Attached as Exhibit A is a newspaper report concerning
the first trial herein.)

2. I currently reside at 3506 South Bronson
Avenue, Los Angeles, California. I have lived at this
address since May, 1975.

3. I am a junior at California State Univer-
sity at Long Beach, California and am majoring in biology.
I intend to study medicine upon completion of my under-
graduate program. I also work part-time during the school
year and full-time during the summer as a produce clerk

at Ralph's Supermarket on West Third Street, Los Angeles.

4. I have a telephone at my above home address, the number of which is 213-732-4592. This phone was installed there prior to my moving in but has been listed in my name since I moved in.

5. I have encountered severe difficulties and numerous unusual circumstances in the use of this phone. Often, I am unable to obtain the normal dial tone one gets upon picking up a phone to place a call. On other occasions, there have been a series of clicks on my line which in Los Angeles should only occur when a call is placed outside the message unit area but which have occurred when I have placed calls within that area. Several times I have been in the middle of dialing a number when I have heard other voices on the line talking with each other. I have noticed that often times these are the same voices which I have heard while making earlier calls from my phone. Also, there is frequently a terrific amount of static on my line during a conversation, so much so that I and the party I am talking to have on several occasions been forced to hang up and one of us then redial the other's number.

6. Based upon the foregoing, I believe my home telephone has been the subject of electronic surveillance. Upon information and belief, no judicial approval for such surveillance has been obtained and any such surveillance is unlawful.

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7. I had occasion to talk with one of the defendants herein, Elizabeth Young Chin, from my home telephone. At least one of those conversations, which occurred between July 29 and October 4, 1975, was relevant to the subject matter of the indictment in this case and to the statement I subsequently gave to John Carencio, the Bureau of Alcohol, Tobacco and Firearms Agent, on October 24, 1975.

/s/

MICHAEL YANAGITA

Sworn to before me this _____
day of June 1976.

JAMES REIF, Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : AFFIDAVIT

KENNETH RAYMOND CHIN, and : 75 CR 851 (s)
ELIZABETH JANE YOUNG, now :
known as Elizabeth Jane :
Young Chin, :

Defendants; :

Application of Michael Yanagita. :

-----x

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

LILLY TANABE, being duly sworn, deposes and says:

1. I live at 1389 S. Orange Drive, Los Angeles
California 90019. My phone number is 213-936-6517.

2. I have known Michael Yanagita since 1974.

3. During this time, including July, 1975
to the present, I have called Michael Yanagita numerous
times at his apartment at 3506 Bronson Ave.4. On such occasions, there has frequently
been a noticeable level of static on the telephone line.
This static has been so bad that we have had to terminate
several conversations and one of us has had to redial the
other's telephone number. The static usually is present
on the second phone call, but to a lesser degree. I
have noticed the presence of such static for about the
last year.5. I have never encountered such static when
calling any telephone number from my home other than

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that of Michael Yanagita.

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/s/

LILLY TANABE

Sworn to before me
this _____ day of
June 1976.

JAMES REIF

NY Times
April 17, 1976
P. 24

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WOMAN ACQUITTED IN GUN CONSPIRACY

Jury Splits on 2d Charge
in Alleged Hirohito Plot

By MAX H. SEIGEL

A 31-year-old Chinese-American woman suspected of involvement in a plot to assassinate Emperor Hirohito of Japan when he visited this city last October was acquitted yesterday on charges of conspiring to transport weapons from California to New York.

But the jury in Federal Court in Brooklyn reported itself hopelessly deadlocked in seeking to determine whether the woman was guilty of having actually transported the weapons, and Chief Judge Jacob Mishler, who presided at the three-day trial, declared a mistrial on that charge.

The defendant, Elizabeth Jane Young, and a friend, Kenneth Raymond Chin, 27, with whom she shared an apartment at 925 Union Street, in the Park Slope section of Brooklyn, were arrested by Secret Service agents Oct. 4, only a few hours before Emperor Hirohito arrived here for a four-day visit.

Before taking the couple into custody, the agents, acting on information from the Federal Bureau of Investigation in Los Angeles, broke into their apartment and found two semi-automatic rifles with telescopic sights, six other rifles, and a rapid-fire, 14-shot automatic pistol known as an "assassin's special." They said they had also found a large quantity of Chinese Communist literature.

Devoted to Hunting

During the trial, Miss Young contended through her lawyer, Elizabeth Jackson Piel, that she had used the weapons for hunting, a sport to which she said was devoted.

Miss Young also had contended through her lawyer that she moved from New York to California, had become a resident there and, after failing to find work, had decided to move back to New York City. She was employed here as a licensed plumber's apprentice.

The question of whether Miss Young had actually become a California resident became a focal point at the trial. In his charge to the jury, Judge Mishler said that if it felt she had indeed been a California resident, then it could not find her guilty of transporting the weapons since they could have been considered household goods.

At no time during the trial was there any mention of a plot against Emperor Hirohito. And no charges involving any such plot were made against Miss Young.

But the Secret Service, which arrested both her and Mr. Chin, who married her two weeks ago, said it would not have been involved had there not been a question of providing for the safety of a foreign dignitary. A visiting head of state it was explained, would come under this category.

Ethan A. Levin-Epstein, the assistant United States attorney who tried the case for the Government, said he was seeking a superseding indictment for a new trial of Miss Young. This time, he said, she may be tried together with her husband, who has been charged with the same crimes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

AFFIDAVIT

75 CR 851(8)

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, now
known as Elisabeth Jane Young Chin,

Defendants.

----- X

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

THOMAS R. PATTISON, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Eastern District of New York; that he is Deputy Chief of the Criminal Division and has acted in a supervisory capacity in the instant case.

In connection with the witnesses Kondo and Yanagita's motions relative to electronic surveillance, your deponent has been informed by Special Agent Edward Gervin of the Bureau of Alcohol, Tobacco and Firearms, the investigating agency involved, that they have no record of any electronic surveillance conducted on telephone numbers 213-732-4592 or 213-939-1423. This information was provided to your deponent on this date and was the result of communications with the National Headquarters of the Bureau of Alcohol, Tobacco and Firearms.

Moreover, your deponent has no knowledge from any source whatsoever that the witnesses Kondo or Yanagita were ever the subject of any electronic surveillance.

THOMAS R. PATTISON
Deputy Chief, Criminal Division

Sworn to before me this
21st day of June 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

101

----- X

UNITED STATES OF AMERICA

- against -

ORDERKENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, now
known as "Elizabeth Jane
Young Chin",

75 CR 852(S)

Defendants.

----- X

Upon the motion of DAVID G. TRAGER, United States Attorney for the Eastern District of New York, by Ethan Levin-Epstein, Assistant United States Attorney, for an order requiring MICHAEL K. YANAGITA to testify and give other information at the trial of the above-captioned matter, on June 21, 1976, or at any subsequent time that this Court may direct, and the representations made therein, and it appearing to the Court that:

(1) MICHAEL K. YANAGITA has been called by the United States to testify at the trial of the above-captioned matter.

(2) MICHAEL K. YANAGITA has already refused to testify or provide other information at said trial on the basis of his privilege against self-incrimination.

(3) In the judgment of the United States Attorney for the Eastern District of New York, the testimony or other information from MICHAEL K. YANAGITA may be necessary to the public interest.

(4) The motion of the United States Attorney for the Eastern District of New York for this order has been made with the approval of the Assistant Attorney General in

Charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. §6003 and 28 C.F.R. §0.175, it is hereby

ORDERED, pursuant to 18 U.S.C. §§6002 and 6003, that the said MICHAEL K. YANAGITA give testimony and provide other information which he refuses to give or to provide on the basis of his privilege against self-incrimination as to all matters about which he may be interrogated at the above-captioned trial.

Dated: Brooklyn, New York
June 21, 1976

/s/ Jacobs Mishler
UNITED STATES DISTRICT JUDGE
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

106

----- X

UNITED STATES OF AMERICA

- against -

AFFIDAVIT

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, now known
as "Elizabeth Jane Young Chin",

75 CR 851(S)

Defendants.

----- X

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

ETHAN LEVIN-EPSTEIN, being duly sworn, deposes
and says:

(1) He is an Assistant United States Attorney
on the staff of DAVID G. TRAGER, United States Attorney
for the Eastern District of New York.

(2) He makes this affidavit in support of a
motion for an Order of this Court pursuant to the pro-
visions of 18 U.S.C. §§6002 and 6003 requiring MICHAEL K.
YANAGITA to testify and give other information which he
refused to give and provide on the basis of his privilege
against self-incrimination, as to all matters about which
he may be interrogated in the trial of the above-captioned
matter.

(3) The said MICHAEL K. YANAGITA has been called,
by the United States, as a witness in the trial of the
above-captioned case.

(4) In the judgment of the United States Attorney
for the Eastern District of New York, the testimony of or
other information from said witness may be necessary to the
public interest.

(5) The said witness has refused to testify or provide other information on the basis of his privilege against self-incrimination.

(6) The Honorable Richard L. Thornburgh, Assistant Attorney General in Charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. §6003 and 28 C.F.R. §0.175, has approved the making of this application. A copy of said approval is attached hereto as Exhibit A.

/s/ ERE
ETAN LEVIN-EPSTEIN
Assistant U. S. Attorney

Sworn to before me this
21st day of June 1976.

/s/ Jacob Mishler

Department of Justice
Washington 20530

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April 12, 1976

Honorable David G. Trager
United States Attorney
Eastern District of New York

Attention: Mr. Ethan Leven-Epstein
Assistant U.S. Attorney

Re: United States v. Kenneth R. Chin and
Elizabeth Jane Young, 75 CR 851

Dear Mr. Trager:

Pursuant to the authority vested in me by 18 U.S.C. §6003(b) and 28 C.F.R. §0.175(a) I hereby approve your request for authority to apply to the United States District Court for the Eastern District of New York for an order pursuant to 18 U.S.C. §§6002-6003 requiring Michael K. Yanagita to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

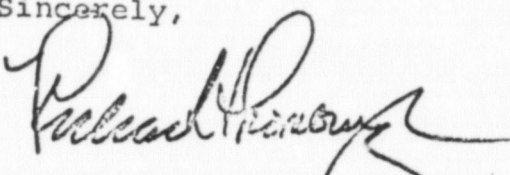
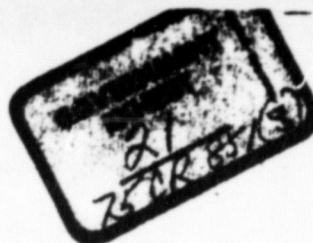

RICHARD L. THORNBURGH
Assistant Attorney General

EXHIBIT A



Department of Justice
Washington 20535

A 110



9/6/81 N7P

JUN 18 1976

Mr. David G. Trager
United States Attorney
New York, New York

Attn: Ethan Leven-Epstein
Assistant United States Attorney

Re: United States v. Kenneth R. Chin
and Elizabeth Jane Young (also
known as Elizabeth Jane Young Chin)

Dear Mr. Trager:

Pursuant to the authority vested in me by 18 U.S.C. §6003(b) and 28 C.F.R. §0.175 and §0.133 I hereby approve your request for authority to apply to the United States District Court for the Eastern District of New York for an order pursuant to 18 U.S.C. §§6002-6003 requiring Mark Choyei Kondo to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

ROBERT L. KEUCH, Acting
Assistant Attorney General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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----- X

UNITED STATES OF AMERICA

-against-

COMMITMENT ORDER

75 CR 651(S)

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, a/k/a
"Elizabeth Jane Young Chin"

Defendants.

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WHEREAS, MICHAEL K. YANAGITA, has been called as a witness to testify on behalf of the United States at the trial of the above-captioned matter, and

WHEREAS, MICHAEL K. YANAGITA, has been granted limited use immunity from prosecution under 18 U.S.C., §§6002 and 6003, and

WHEREAS, MICHAEL K. YANAGITA, has refused, notwithstanding the above noted grant of immunity, and the direction of the Court, to answer questions asked of him, and

WHEREAS, MICHAEL K. YANAGITA, has been advised by the Court, in the presence of his attorney, James Raif, Esq., 308 Livingston Street, Brooklyn, New York, that such a refusal to answer will result in a citation for contempt of Court and incarceration for the duration of this trial or six (6) months, whichever is less, and

WHEREAS, MICHAEL K. YANAGITA, has persisted in his refusal to answer questions, basing his refusal

BEST COPY AVAILABLE

on the privilege against self-incrimination, it is therefore

ORDERED, that MICHAEL K. YANAGITA, be immediately remanded to the Custody of the Attorney General of the United States and/or to the United States Marshal for the Eastern District of New York, or any of each of their duly authorized representatives, to be incarcerated at the place of their proper selection, for a period not to exceed one (1) month from this date, or until such time as the trial of the above-captioned matter, now in progress, shall reach a verdict.

SO ORDERED.

Dated: Brooklyn, New York
June 22, 1976

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JACOB NISSEN
Chief United States District Judge
Eastern District of New York

June 22 76
BY *Max Hill*
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

-against-

COMMITMENT ORDER

75 CR 851(S)

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, a/k/a
"Elizabeth Jane Young Chin"

Defendants.

- - - - - X

WHEREAS, MARC CHOYEI KONDO, has been
called as a witness to testify on behalf of the
United States at the trial of the above-captioned
matter, and

WHEREAS, MARC CHOYEI KONDO, has been
granted limited use immunity from prosecution under
18 U.S.C., §§6002 and 6003, and

WHEREAS, MARC CHOYEI KONDO, has refused,
notwithstanding the above noted grant of immunity, and
the direction of the Court, to answer questions asked
of him, and

WHEREAS, MARC CHOYEI KONDO, has been advised
by the Court, in the presence of his attorney, James Reif,
Esq., 308 Livingston Street, Brooklyn, New York, that
such a refusal to answer will result in a citation for
contempt of Court and incarceration for the duration of
this trial or six (6) months, whichever is less, and

WHEREAS, MARC CHOYEI KONDO, has persisted
in his refusal to answer questions, basing his refusal

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-2-

on the privilege against self-incrimination, it
is therefore

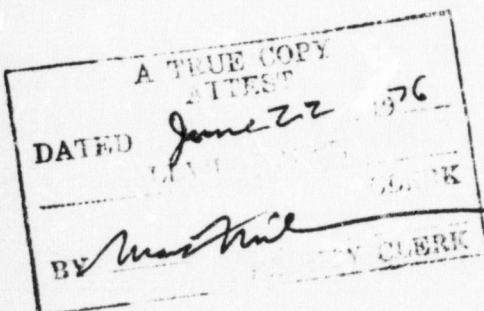
112

ORDERED, that MARC CHOYEI ROADO, be
immediately remanded to the Custody of the Attorney
General of the United States and/or to the United
States Marshal for the Eastern District of New York,
or any of each of their duly authorized representatives,
to be incarcerated at the place of their proper
selection, for a period not to exceed one (1) month from
this date, or until such time as the trial of the
above-captioned matter, now in progress, shall reach a
verdict.

SO ORDERED.

Dated: Brooklyn, New York
June 22, 1976

/s/
JACOB MYERLER
Chief United States District Judge
Eastern District of New York



TRP:EL-E:rd
F# 761,904
F# 761,905

A 115 113

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

76 CR 420

76 CR 421

-against-

MICHAEL KAZUO YANAGITA, and
MARC CHOYEI KONDO,

Defendants.

----- X

GOVERNMENT'S MEMORANDUM OF LAW

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

ETHAN LEVIN-EPSTEIN
Assistant U.S. Attorney
(Of Counsel)

INTRODUCTION

This Memorandum of Law is submitted in opposition to both defendant Kondo's and defendant Yanagita's motions to dismiss their respective informations. Inasmuch as defense counsel has consolidated their cases in his papers, the Government has done the same and, for the Court's convenience, would not object to the matters being consolidated for all purposes. Federal Rules of Criminal Procedure, Rules 8(b) and 13.

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POINT IDEFENDANTS' INSTANT PROSECUTIONS
ARE NOT BARRED ON DOUBLE JEOPARDY
GROUNDS

Defendants contend that the informations in their cases before this Court constitute a violation of the Fifth Amendment, in that, it is alledged, they have been placed in jeopardy twice for the same crime -- criminal contempt of court. They claim that Judge Mishler's summary finding of contempt for their refusal to answer questions after being granted immunity was criminal, in nature, and therefore precludes the instant prosecutions.

This claim is frivolous at best and disingenuous at its worst. It ignores an explicitly clear record of the proceedings before the Chief Judge.

Defendants aver, and the Government agrees, that the critical issue is whether or not Judge Mishler's rulings constituted a finding of civil or criminal contempt. Cf. Shillitani v. United States, 384 U.S. 364 (1966). The test as to whether a contempt is of one form or the other is correctly noted by defendants (Gompers v.

Buck's Stove & Range Co., 221 U.S. 418, 441-443 (1911)), as being dependant on whether the Court's purpose was punitive (criminal) or coercive (civil).

It bespeaks a certain temerity on the part of defendants' counsel to argue that no provision was made by Judge Mishler for defendants to purge themselves of these coercive contempt citations in light of the record.

On the first day of trial, June 21, 1976, the defendants Yanagita ^{1/} and Kondo were called as a Government witnesses, outside the jury's presence, asserted the privilege against self-incrimination, were granted immunity, persisted in their refusal to testify and were held in contempt (T. 38; 44; 59; 154; 161-162; 171) ^{2/}

^{1/} Yanagita had been called as a witness at a prior trial of this case which ended in a mistrial. On that occasion, too, he was granted immunity after asserting the privilege, but was not required to testify in light of a stipulation entered into between the defendant Young and the Government.

At that trial, also, Yanagita was told he could purge himself at any time.

^{2/} "T." refers to pages in the trial transcript. The pertinent portions of the transcript have been attached hereto as Exhibit B, with notations indicating the date on which the particular proceedings occurred.

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In denying a collateral motion for Government affirmance or denial of the existence of electronic surveillance in the case, ^{3/} Judge Mishler stated:

"I find that [the motion was made] solely for the purpose of avoiding the coercive power that this Court has in a contempt proceeding..." (T.38) (emphasis supplied).

When advising Mr. Yanagita of his power to hold him in contempt the Court stated:

"Now, if you refuse to answer questions put to you at the direction of the Court you may be in contempt of Court and if you are in contempt of Court the Court may direct that you be committed to a federal institution for a period of not more than six months or the length of this trial, whichever is shorter. Do you fully understand what I am saying to you?"

THE WITNESS: (Indicating in the affirmative.) (T.44-45) (emphasis supplied).

Later that morning Judge Mishler reaffirmed his earlier finding that the motions had been made "in bad faith and solely for the purpose of disrupting the trial

^{3/} See, Point III, infra.

and avoiding the impact or frustrating the power of the Court to impose coercive punishment on [Yanagita]."

(T.59) (emphasis supplied).

On the afternoon of June 21, 1976 the Court recalled the first Chin trial where Yanagita had refused to testify:

"... I indicated to him that if he failed [to testify] under a grant of immunity that he would be placed in custody as a coercive measure to compel his testimony." (T.154) (emphasis supplied).

Finally, when Yanagita was actually held in contempt, Judge Mishler expressly stated that it was a coercive measure:

"I find the witness Michael Yanagita is in contempt of Court for wilful refusal to answer questions properly posed by the Court.

I direct the witness to return to the Court at 9:15 tomorrow morning. I will give you one last opportunity to answer the question. If you fail to do it, I intend to commit you to the custody of the Attorney General or the Marshal for the Eastern District of New York. And I ask you, Mr. Levin-Epstein, to prepare a commitment order.

A 121 112

I also direct you, Mr. Reif, to immediately prepare a notice of appeal. I will stay the orders until two o'clock. You can run over to the Court of Appeals and argue it. And failing any extension of the stay, I intend that this witness be committed for the term indicated unless he changes his mind by tomorrow morning.

Do you understand the full implication of what I said, Mr. Yanagisawa?

THE WITNESS: "Yes, I do."
(T. 161-162) (emphasis supplied)

A similar direction was given to Kondo when his turn came:

"You are directed to return here tomorrow at 9:15 and at that time I will give you a last chance to purge yourself of the contempt and change your mind. Think about it.

If you refuse to answer I intend to commit you to the Metropolitan Correctional Center or to the custody of the Attorney General of the United States until such time as you answer but no longer than six months or the duration of the trial of this case and you can purge yourself at any time before that time by answering."
(T.171) (emphasis supplied).

The following morning both defendants again declined the Court's offer to "purge" themselves. (T. 176-177).

The stay of execution was later extended to June 23, 1976 at 11:00 A.M. (T.388), at which time Judge Mishler again told the defendants that they could purge themselves. He further advised them that "this contempt" (i.e. the contempt imposed summarily by the Court) might not end the matter-- that they might be facing a "further proceeding" brought on by the Government (T. 389). This "further proceeding" was explicitly identified, by the prosecutor, as a "criminal" contempt. The distinction was, again, made explicit by the Court's remarks:

"... As far as any sentence here is concerned, there will probably be a short sentence. But I want you to know that that might not be all.

I want that clearly understood so there is no complaint later.

You always have a chance to purge yourselves at anytime up until the time the jury renders its verdict because up until then your testimony can be given.

(T.390)

(emphasis supplied).

The following day, June 23, Yanagita was again advised of his ability to purge his contempt (T.417), and of the distinction between civil and criminal contempt (T.417-418).

A 123 121

As final and conclusive proof of what was, throughout the trial, Judge Mishler's obvious intent, the following remarks to the jury, after the verdict, are noteworthy:

"I held [Yanagita and Kondo] in contempt of Court. They went to jail in the hope that jail might give them a taste of the pressures and that they would come into Court and testify. They still refused to do that so they were charged with criminal contempt..."
(T.848) (emphasis supplied).

Nothing that the Government could add here would belie the allegation of double jeopardy more eloquently and conclusively than the record itself.

POINT II

DEFENDANTS WERE PROPERLY HELD
IN CIVIL CONTEMPT NOTWITHSTANDING
ANY PUTATIVE CLAIM OF PRIVILEGE
AGAINST THEIR TESTIMONY BEING USED
IN SOME POSSIBLE FOREIGN PROSECUTION

In support of their argument that the Fifth Amendment privilege against self-incrimination precludes them from being held in contempt for refusing to testify, defendants rely upon the case of In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972). In that case, one Karen Cardassi received use immunity and was called to testify before a federal grand jury in Connecticut which was investigating marijuana smuggling from Mexico. Notwithstanding the grant of immunity, Cardassi asserted her Fifth Amendment privilege against self-incrimination and refused to testify. In denying a motion for an order directing Cardassi to give testimony, Judge Newman held that Cardassi's assertion of the privilege against self-incrimination was proper since she had a reasonable fear of prosecution in Mexico and since a substantial portion of the grand jury's inquiry focused upon marijuana dealings in Mexico.

A 125 103

In Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), the Supreme Court specifically left undecided the question of whether a grant of use immunity removes the privilege of self-incrimination when the witness alleges fear of foreign prosecution. The Court was not required to reach this question because it found that the witness was not required to give answers which provided a reasonable basis for fearing foreign prosecution. However, in the case of In re Parker, 411 F.2d 1067, 1069-1070 (10th Cir. 1969), vacated and remanded for dismissal as being moot, Parker v. United States, 397 U.S. 96 (1970), the Tenth Circuit rejected the argument that the privilege against self-incrimination protects a witness against incrimination in a foreign jurisdiction:

"The fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation." 411 F.2d at 1070.

It is respectfully submitted that this Court

should adopt the position of the Tenth Circuit and reject defendants' claims concerning self-incrimination. But even if the rationale of Cardassi is followed in this case, defendants have still failed to show that they have a reasonable basis for fearing foreign prosecution as required by Zicarelli, supra. Chin and Young were prosecuted for unlawfully transporting into, and receiving in, New York firearms purchased in California, in violation of Title 18, United States Code, Section 922(a)(3). The testimony sought from Kondo and Yanagita concerned their sale of the subject weapons to Young in the State of California. It can hardly be reasonably argued that such testimony would have exposed Kondo and Yanagita to prosecution in Japan. In the first place, defendants have made no claim that there was any prosecution pending against them in Japan. Further, they have in no way shown how any such sale would constitute conduct within the scope of Article 77 of the Japanese Penal Code. If anything, the argument they do make militates against such a finding. Viewing the Japanese statutes quoted in a light most "favorable" to defendants' position, and assuming that there, indeed, was a plot to murder the Emperor, it would apparently not come within this law. Everything

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the Emperor is capable of doing (Defendant's Memorandum of Law, p.19) is symbolic. He can do nothing alone. To murder him here would be, without doubt, a heinous crime, but not in Japan.

It is interesting to note that defendants make no mention of all the other safeguards Judge Mishler was willing to provide, albeit the lack of their necessity. The record could have been sealed or the testimony could have been taken in camera had they testified it would have been possible to insulate them even further from this "threat" from the Japanese authorities. This procedure has been approved in cases involving Grand Jury proceeding and there is no reason it could not be applied with equal effect at a trial. Cf. In Re Tierney, 465 F.2d 806, 811-812 (5th Cir.) cert. denied, ___ U.S. ___, 93 S.Ct. 17(1972); Cf. In Re Parker, supra, at 1069-1070.

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POINT III

DEFENDANTS' CONTENTIONS THAT THE
GOVERNMENT HAD FAILED TO ADE-
QUATELY RESPOND TO THEIR ALLEGATIONS
WITH RESPECT TO ELECTRONIC SUR-
VEILLANCE ARE FRIVOLOUS

Defendants' contentions that the United States failed to respond to their allegations with respect to electronic surveillance are entirely meritless. In the first place, Judge Mishler properly rejected the claim with respect to wiretapping as not being timely made (T. 156). Yanagita failed to raise this point at the time of the first trial, and both he and Kondo were issued subpoenas well in advance of the June 21 trial date in ample time for them to make timely motions. ^{4/} Moreover, the affidavits submitted by them in support of their assertions concerning wiretapping contained statements

^{4/} It has been held in this Circuit that defendants who fail to timely object to the introduction of wiretap evidence waive their right to challenge the admissibility of such evidence. United States v. Sisca, 503 F.2d 1337, 1346 (2d Cir. 1974), cert. denied, 419 U.S. 1009 (1975). Witnesses who fail to timely assert their rights under Section 3404 should fare no better, particularly where the time pressures of an ongoing trial make it impossible to conduct a thorough check of all government agencies.

A 129 107

amounting to little more than vague unsupported suspicions with respect to the existence of wiretaps on their phones. See, e.g. In re Millow, 529 F.2d 770, 774-775 (2d Cir. 1976). The affidavit of Assistant United States Attorney Pattison (Attached hereto as Exhibit A), in which Mr. Pattison stated that he had been advised by the Washington headquarters of the Bureau of Alcohol, Tobacco and Firearms (the federal agency prosecuting the case) that there was no record of any electronic surveillance on Kondo's and Yanagita's phones, was an entirely sufficient response to appellants' frivolous claims and met the requirements of Section 3504 of Title 18. See United States v. Grusse, 515 F.2d 157 (2d Cir. 1975); Cf. also, Russo v. United States, 404 U.S. 1209 (1971).

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POINT IVAUTHORIZATION FOR THE GOVERNMENT'S
MOTION FOR A GRANT OF IMMUNITY FOR
KONDO WAS PROPER

Defendant Kondo contends that inasmuch as the Department of Justice authorization for the Government's motion for his grant of immunity did not come directly from the Assistant Attorney General, it is invalid and he cannot now be prosecuted for his refusal to answer. This assertion is without merit.

First, the authorization was properly obtained from an official empowered to give it. Second, even if this Court determines that the correct internal procedure of the Department of Justice was not followed, such a finding would in no way obviate defendant's obligation to testify.

Section 6003(b) of Title 18, United States Code provides that any applications for limited use immunity for a witness must first be approved by "the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General."

The Assistant Attorney General in charge of the

A 131 120

the Criminal Division of the Department of Justice (Hon. Richard L. Thornburgh) is designated to act on behalf of the Attorney General in authorizing such requests for immunity (28 C.F.R. §0.175(a)).

In case of Mr. Thornburgh's inability to act, he may authorize his ranking deputy to act in his place. (On June 18, 1976, the relevant date herein, Deputy Assistant Attorney General John C. Keeney was Mr. Thornburgh's "ranking deputy"). (28 C.F.R. §0.133).

Of course, should Mr. Keeney be unable, for some reason, to take over for Mr. Thornburgh, his ranking deputy could be designated to step in, supra. On June 18, 1976, Deputy Assistant Attorney General Robert L. Keuch was Mr. Thornburgh's next "ranking deputy" (behind Mr. Keeney).

This office has been informed that, through long standing oral authorization from Assistant Attorney General Thornburgh, when he is away from Washington, D.C., Mr. Keeney is authorized to take over his duties relative to 18 U.S.C. §6003. Likewise, in the unlikely event that both Assistant Attorney General Thornburgh and Deputy Assistant Attorney General Keeney are away from Washington,

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D.C., Deputy Assistant Attorney General Keoch becomes the Acting Assistant Attorney General.

We are also informed that, on June 18, 1976, both Assistant Attorney General Thornburgh and Deputy Assistant Attorney General Keeney were away from the city of Washington, D.C.*

Notwithstanding any possibility that the immunity request was not properly authorized, it is clear that the immunity was granted by the Court and in full force.

In keeping with the spirit, if not the actual holding of Garrity v. New Jersey, 385 U.S. 493 (1967), it is clear that, in the instant case, defendants were granted immunity.

Whether or not Chief Judge Mishler was "empowered" to grant immunity because, arguendo, Deputy Assistant Attorney General Keuch could not properly

* The matters contained within this and the preceeding two paragraphs will be provided to the Court in the form of an affidavit, if necessary.

A 133 131

authorize the application, the immunity was granted. Without doubt, any subsequent claim, by a prosecutorial agency, that the defendants should not have relied on this "invalid" immunity would have to withstand extraordinary equitable argument by the defendants. They were told, by a United States District Judge, that they no longer had any privilege to refuse to testify in this matter. They were told that they would, most assuredly, go to jail if they persisted in their refusal. In the face of such a prospect it would indeed be an unfair rule which provided that defendants were then afforded no protection from subsequent prosecution, and their reliance upon the Court's authority was misplaced.

This reasoning is especially logical when considered with the holding in In Re Tierney, 465 F.2d 806 (5th Cir.) cert. denied, _____ U.S. _____, 93 S.Ct. 17 (1972), where it was held that "the supposed departure" from the Department of Justice guidelines in the authorization of an application for immunity was not controlling as to the issue of whether or not immunity had

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been conferred, supra at 813.*

In Tierney it was specifically held that:

"The guidelines on which appellants rely are directed to the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses." supra, at 813 (emphasis supplied).

* In In Re Tierney, supra, a case upon which defendants rely (Defendants Memorandum of Law, p. 46a), the Court of Appeals for the Fifth Circuit was presented with, and decided, no fewer than three of the very same issues presented here. The case involved the refusal, of a series of witnesses before a Grand Jury, to answer questions on grounds of (a) possible foreign incrimination not precluded by a domestic grant of immunity, (b) The alledged failure of the Government to adequately respond to a demand for information regarding the existence of supposed electronic surveillance, and (c) the alledged inadequacy of an Acting Assistant Attorney General's authorization for an immunity application. All three points were resolved in favor of the Government's position, and defendants' citations for contempt were affirmed, notwithstanding precisely the same arguments made sub judice.

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CONCLUSION

Defendants' motions to dismiss each of the
respective informations should be denied in all respects.

Dated: Brooklyn, New York
August 5, 1976

Respectfully submitted

DAVID G. TRAGER
United States Attorney
Eastern District of New York

ETHAN LEVIN-EPSTEIN
Assistant U.S. Attorney
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

AFFIDAVIT

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, now
known as Elizabeth Jane Young Chin,

75 CR 851(S)

Defendants.

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STATE OF NEW YORK)

) SS:

COUNTY OF KINGS)

THOMAS R. PATTISON, being duly sworn, deposes and
says that he is an Assistant United States Attorney for the
Eastern District of New York; that he is Deputy Chief of the
Criminal Division and has acted in a supervisory capacity
in the instant case.

In connection with the witnesses Kondo and Yanagita's
motions relative to electronic surveillance, your deponent
has been informed by Special Agent Edward Gerwin of the
Bureau of Alcohol, Tobacco and Firearms, the investigating

JUNE 21, 1976

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1 who indicate they refuse to testify.

2 Ask Mr. Reif to come in with his two witnesses.

3 MR. LEVIN-EPSTEIN: May I have about sixty
4 seconds, your Honor?

5 THE COURT: Yes.

6 MR. LEIBOWITZ: Are we required to remain in
7 court during that time?

8 THE COURT: No, but you are invited to stay, if
9 you wish.

10 Michael Yanagita -- is there a motion on behalf
11 of Michael Yanagita also -- motion to quash?

12 MR. REIF: No, sir.

13 There is a motion regarding disclosure of
14 electronic surveillance.

15 THE COURT: The motion to quash the subpoena
16 served on Mark Kondo is denied and it is so ordered.

17 Now, on a motion to disclose electronic
18 surveillance, are you ready to say whether there was any
19 electronic surveillance of Kondo and Yanagita?

20 MR. LEVIN-EPSTEIN: I'm ready to say what I know
21 and to my knowledge there has been no electronic
22 surveillance anywhere in the case.

23 When I say "my knowledge," the Court, I am sure,
24 recognizes --

25 THE COURT: Can you affirm as absolutely as you

1 can that any of the testimony that you intend to

2 solicit from Yanagita and Kondo were not the product of
3 any electronic surveillance?

4 MR. LEVIN-EPSTEIN: Yes, with this qualification:
5 I am representing what I know, as an individual, and
6 not what I know as part of the Government.

7 I have no knowledge that would indicate to me
8 that there was any electronic surveillance on Mr. Kondo
9 or Mr. Yanagita or anyone else in the case at all.

10 But there has been no all-agency check on this
11 case or would there be any reason for an all-agency
12 check inasmuch as today was the first notice we had of
13 anything like this.

14 THE COURT: But more important, directing my
15 remarks to the motion, there seems to be an indication
16 that the wire went dead and there was interference,
17 all that going on since the trial, you see.
18 However, you do not intend to ask any questions about
19 anything that occurred since the trial?

20 MR. LEVIN-EPSTEIN: Absolutely not.

21 The only information I had at my disposal and
22 upon which I intend to formulate questions is the
23 information available to me prior to the commencement
24 of the prior proceeding.

25 I know of no electronic surveillance and these

1 motions come as a complete surprise to me.

2 THE COURT: Was immunity, use immunity given to
3 Mr. Kondo?

4 MR. LEVIN-EPSTEIN: I made application to the
5 Assistant Attorney General for use immunity, should it
6 become necessary for Mr. Kondo's testimony to be
7 compelled.

8 I have been informed this morning that on the
9 authorization of Robert L. Keuch, who is the Acting
10 Assistant Attorney General at this time, as of
11 June 18, 1976, permission has been granted on behalf of
12 the Government through the Department of Justice for
13 the Government to make application to this Court under
14 Title 18, United States Code, Sections 6002 and 6003
15 to grant limited use immunity to Mark Choya Kondo.
16 The Court has already done that with Mr. Yanagita.

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THE COURT: Doyou intend to make use of the use immunity should it become necessary as to Mr. Kondo's testimony?

MR. LEVIN-EPSTEIN: Should it become necessary.

MR. REIF: As to electronic surveillance it seems to me that's a separate question since immunity deals with the Fifth Amendment question.

THE COURT: I understand that.

MR. REIF: If it's your Honor's intention to treat Mr. Levin-Epstein's oral representation that he just made as the Government's response to the motion then I would wish to strike it as being legally insufficient.

In the first place, courts have uniformly ruled that such a response must be sworn; second, they also ruled they must be based on inquiry with the appropriate agency and not limited to the knowledge of the U.S. Attorney.

There are several cases which have reached the Supreme Court --

THE COURT: I am familiar with them, Mr. Reif. I am familiar with them.

MR. REIF: If your Honor might allow me to complete my statement -- there are several cases in

1 the Supreme Court, at least one of which originated in
2 this court, where a case was completed at trial level
3 without there being an adequate inquiry as to the
4 question of whether or not there had been electronic
5 surveillance and it was subsequently determined there
6 was, unknown to the U.S. Attorney prosecuting the case.

7 Whereas I have no basis for doubting
8 Mr. Levin-Epstein's statement, I do, however, suggest
9 that it is insufficient, as a matter of law, to the
10 motion.

11 THE COURT: Let me ask this, Mr. Reif --

12 MR. REIF: It is pronounced Reif, sir.

13 THE COURT: I hope that's the only error I make
14 with you, Mr. Reif.

15 When did you first learn that Mr. Tanagita was
16 served with a subpoena to testify --

17 MR. REIF: It's Yanagita --

18 THE COURT: Oh, please. Stop playing with
19 names.

20 When did you first learn this witness was
21 subpoenaed?

22 MR. REIF: In the first trial and he appeared as
23 a witness at that time, as your Honor knows, as your
24 Honor was the Judge at that proceeding --

25 THE COURT: Now tell me something I don't know.

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When was he subpoenaed in this trial?

MR. REIF: I don't know the specific date.

THE COURT: When did you first know of it?

MR. REIF: Your Honor, it was some time ago.

We are not claiming --

THE COURT: I want to know the date.

MR. REIF: Perhaps Mr. Levin-Epstein has the exact date.

THE COURT: May 18th he was served. How soon after that did you learn --

MR. LEVIN-EPSTEIN: Excuse me, your Honor. That was Mr. Kondo.

Mr. Yanagita -- may I first point out that Mr. Yanagita was informed of service and it was ordered directly by the order of this Court for him to appear here today. So there was that notification.

Secondly, Mr. Yanagita was served with a subpoena and Mr. Reif was also notified of the service of that subpoena, the subpoena issued from my office May 10, 1976.

Mr. Reif was notified by Registered Mail or rather certified mail, return receipt requested.

I have a copy of that return receipt executed by one Carolyn Meyer of Mr. Reif's office.

The letter reads -- I'll read it into the

1 record -- dated May 10, 1976 and addressed to Mr. Reif
2 at 306 Livingston St. in Brooklyn; Certified Mail,
3 return receipt requested:

4 "Dear Mr. Reif:

5 "Enclosed please find a sealed carbon copy of
6 a subpoena --"

7 I'm sorry, it relates to Mr. Kondo, your Honor.

8 I related to Mr. Reif, by telephone, that
9 Mr. Yanagita would be served but he was ordered to
10 appear verbally by this Court at his last appearance
11 here, on the last day of trial.

12 I misrepresented to the Court mistakenly.

13 THE COURT: Why did you wait until Jun to
14 sign an affidavit and draw your motion papers
15 requesting the Government to reveal any electronic
16 surveillance?

17 MR. REIF: I don't make this motion lightly and
18 I could have --

19 THE COURT: You say you don't make this motion
20 lightly?

21 MR. REIF: No, I don't.

22 THE COURT: When you get through with your
23 explanation I will make a determination on that.

24 MR. REIF: I don't make this motion lightly
25 and it is quite possible to make a motion of this sort

1 rather quickly, rather easily, based on information and
2 belief, and so forth.

3 I didn't do that because I wasn't aware that there
4 was a sufficient basis to believe that Mr. Yanagita or
5 Mr. Kondo might have been the subject of electronic
6 surveillance.

7 I make this motion only upon learning the facts
8 contained in Mr. Kondo's affidavit.

9 I had not seen or met Mr. Kondo until Friday.
10 We made an arrangement whereby he could come a few days
11 early so I could speak to him and only after speaking to
12 him did I realize there was such a possibility and
13 therefore, I inquired of Mr. Yanagita as well and it is
14 on the basis of facts that I learned over the weekend
15 that the motion is made.

16 I could have made a motion six weeks ago and
17 that would have put the matter before your Honor sooner--

18 THE COURT: You asked Mr. Yanagita whether he
19 thought there was any electronic surveillance or was
20 it initiated with him?

21 Did he come and say, I suspect my telephone is
22 tapped or did you say, how about it -- was your telephone
23 tapped?

24 MR. REIF: I obtained information as to
25 Mr. Yanagita from information I obtained from Mr. Kondo

1 in discussion.

2 THE COURT: When was that?

3 MR. REIF: Friday.

4 THE COURT: Did you then call Mr. Levin-Epstein
5 and say, get ready, I'm making an application as to
6 electronic surveillance. Check the agencies to see
7 about it so there is no need to adjourn the trial --
8 did you do that?

9 MR. REIF: This is the first day of court since
10 I learned of the matter.

11 THE COURT: Mr. Reif, I find the motion is made
12 in bad faith. I find that the lawyer participated in
13 it. I find that it was done solely for the purpose of
14 avoiding the coercive power that the Court has in a
15 contempt proceeding because under your tactics -- and
16 that's all it is -- if the Court were to accede to the
17 consideration of the motion and direct the Government to
18 check the agencies, the Court would be without power to
19 hold this defendant, this witness in contempt.

20 You indicated the last time that you had a
21 theory of extraterritorial criminal jurisdiction that
22 might be exercised by the Japanese Government and you
23 argued that. At least that was a logical, arguable
24 theory. But that fell through so now you come into
25 court and demand revelation of any electronic

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1 surveillance knowing that if the Court directed the
2 Government to do it, Mr. Yanagita. I hope I
3 pronounced it right -- did I?

4 MR. YANAGITA: Yes.

5 THE COURT: Thank you -- you wouldn't have to
6 worry about possible jail for refusing to testify.

7 It's offered as a palpable fraud upon the Court
8 and I can describe it as nothing else.

9 Now, swear Mr. Yanagita in --

10 MR. REIF: If I might respond --

11 THE COURT: You can go up to the Court of
12 Appeals after I am through here and I will give you the
13 opportunity to do it.

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g/ss 1 MR. REIF: I want to respond because I think you
am6 2 made certain accusations which are unfounded.

3 THE COURT: Go right ahead.

4 MR. REIF: One, I think your Honor is unaware
5 of the procedures that occur when this claim is made.

6 It doesn't require any adjournment or avoidance
7 or any contempt citation.

8 Your Honor seems intent on putting on Mr. Kondo
9 and Mr. Yanagita --

10 THE COURT: How long would it take to make an
11 all agency check?

12 MR. LEVIN-EPSTEIN: I never asked for one
13 before but I can represent it takes a considerable
14 length of time.

15 THE COURT: It's been my experience that it
16 takes weeks.

17 MR. LEVIN-EPSTEIN: That's what I had in mind.

18 MR. REIF: I have been in innumerable cases
19 where the inquiry is made expeditiously and the
20 response received expeditiously and it doesn't require
21 weeks and I would also point out to your Honor that
22 if in fact a short adjournment of a day or two is
23 required, that is not unprecedented.

24 Judge Bauman adjourned a case for a week --

25 THE COURT: He must have determined that the

request was made in good faith. I don't make that determination with you, Mr. Reif.

MR. REIF: I think the sequence of events speak for themselves.

THE COURT: Yes, they do.

Swear in the witness.

M I C H A E L Y A N A G I T A , having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

THE CLERK: State your name and spell it for the record, please.

THE WITNESS: Michael Yanagita, Y-a-n-a-g-i-t-a.

THE COURT: Proceed, Mr. Levin-Epstein.

MR. LEVIN-EPSTEIN: For the record, your Honor, the Government, meaning me, is willing to take an oath and make the same representation I made not being under oath before --

MR. REIF: As I said, our objection is not the implication of the Government's representation is not made in good faith but that it is based on his own knowledge and not an agency check.

THE COURT: Go ahead, Mr. Levin-Epstein.

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q State your name.

Yanagita-direct

A Michael Yanagita.

Q Do you know the defendant Elizabeth Jane Young
now known as Elizabeth Jane Young Chin?

A I take the fifth amendment.

Q Do you know the defendant sitting in the second
row on your right, Mr. Yanagita?

A I take the fifth amendment.

THE COURT: May I have the immunity order?

MR. LEVIN-EPSTEIN: Very well, your Honor.

I believe there is an affidavit attached thereto,
your Honor, which I am willing to execute at this time.

THE COURT: You had better execute the
affidavit.

MR. REIF: Are these new papers that I have not
received before?

THE COURT: Will you please raise your right
hand.

(Government counsel complies.)

THE COURT: Do you swear that the statements
contained in this affidavit are true?

MR. LEVIN-EPSTEIN: I do, your Honor.

THE COURT: Now, Mr. Yanagita, I just signed an
order granting you use immunity.

You can give a copy to Mr. Raif, Mr. Levin-Epstein.

(Document handed to Mr. Reif.)

THE COURT: Upon the motion of David G. Trager, United States Attorney for the Eastern District of New York, by Ethan Levin-Epstein, Assistant United States Attorney, for an order requiring Michael K. Yanagita to testify and give other information at the trial of the above-captioned matter, on June 21, 1976, or at any subsequent time that this Court may direct, and the representations made therein, and it appearing to the Court that:

(1) Michael K. Yanagita has been called by the United States to testify at the trial of the above-captioned matter.

(2) Michael K. Yanagita has already refused to testify or provide other information at said trial on the basis of his privilege against self-incrimination.

(3) In the judgment of the United States Attorney for the Eastern District of New York, the testimony or other information from Michael K. Yanagita may be necessary to the public interest.

(4) The motion of the United States Attorney for the Eastern District of New York for this order has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the

1 Department of Justice, pursuant to the authority
2 vested in him by 18 USC Section 6003 and 28 CFR
3 Section 0.175, it is hereby
4

5 ORDERED, pursuant to 18 USC Section 6002 and
6 Section 6003, that the said Michael K. Yanagita give
7 testimony and provide other information which he
8 refuses to give or to provide on the basis of his
9 privilege against self-incrimination as to all matters
10 about which he may be interrogated at the above-
11 captioned trial.

12 MR. LEVIN-EPSTEIN: Dated today, your Honor.

13 THE COURT: Dated today.

14 Now, this order grants you immunity from the
15 use of any testimony that you may give at the trial so
16 that none of the testimony may be used against you.

17 In effect, it means that you have no right to
18 assert your fifth amendment right against self-
19 incrimination.

20 Now, if you refuse to answer questions put to
21 you at the direction of the Court you may be in
22 contempt of Court and if you are in contempt of Court
23 the Court may direct that you be committed to a
24 federal institution for a period of not more than six
25 months or the length of this trial, whichever is

shorter.

Do you fully understand what I am saying to you?

THE WITNESS: (Indicating in the affirmative.)

THE COURT: You have no right to assert your fifth amendment privilege.

I want to hear on the record that you understand it.

THE WITNESS: I understand what your Honor is saying.

THE COURT: Ask the questions --

MR. REIF: Before Mr. Levin-Epstein does that, we'd renew the issue that we raised last time which your Honor did not rule upon at the time regarding the question of incrimination under the laws of a foreign jurisdiction as that relates to the appropriate --

THE COURT: I will rule on it now.

I find; one, that the crime for which this witness might conceivably give testimony on is not the type of crime that is extraditable under the treaty and two, and more importantly, I find that there is, no right that this witness would have had or has in the event he is extradited, to assert his fifth amendment privilege so his testimony could be compelled under Japanese law.

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2 So, the assertion of a fifth amendment right
3 here on the ground that it is not as broad as the
4 crimes for which he might be indicted or convicted
5 under Japanese law must fail.

6 MR. REIF: We would also renew the motion at
7 this point regarding electronic surveillance on the
8 basis of the grounds that I urged before; that the
9 Government must make an adequate response before the
10 witness can be put in a position of making a
11 determination as to whether or not to testify and the
12 Government has not done that in this case.

13 THE COURT: I find again, this application was
14 not made in good faith.

15 I reject counsel's claim that he wasn't aware
16 of some claim of electronic surveillance until he
17 interviewed Mr. Kondo.

18 No such claim was made at the last trial. The
19 surveillance claimed or the interference claimed in
20 the affidavit was claimed subject to the trial, not
21 prior to it.

22 The Government assistant assures me that no
23 testimony will be offered on any events or statements
24 made after the last trial.

25 MR. REIF: So, there is no misunderstanding for

1 the record, the demand with respect to the electronic
2 surveillance relates not only to the time since the
3 first trial but since the beginning of the investigation
4 of this case which, as I understand it, is sometime
5 last summer.

6
7 THE COURT: Michael Yanagita's affidavit talks
8 about living at that address since May of 1975.

9 Does any of your testimony concern any matters
10 that happened after May, 1975?

11 MR. LEVIN-EPSTEIN: I'll just check to make
12 doubly sure.

13 MR. REIF: Clearly, the indictment charges
14 events occurring in July to October of 1975.

15 MR. LEVIN-EPSTEIN: I intend to ask Mr.
16 Yanagita questions about matters both before and after
17 May of 1975.

18 THE COURT: Aren't these documentary matters?

19 MR. LEVIN-EPSTEIN: There are two documents on
20 which my questions will be based.

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2 THE COURT: when did the transaction take place
3 -- the sale of the gun?

4 MR. LEVIN-EPSTEIN: Weapons. There are two
5 guns involved between Mr. Yanagita and Ms. Young.

6 The Government's proof will be, your Honor, that
7 the weapons were sold or given by Mr. Yanagita to
8 Mr. -- I beg your pardon -- to Ms. Young -- I am
9 trying to pin it down as closely as possible, your
10 Honor -- sometime in the middle of August, 1975.

11 That statement, I'll represent to the Court, is
12 based on the signed, sworn statement of Michael
13 Yanagita given to Special Agent Korenco, an agent of
14 the Bureau of Alcohol, Tobacco and Firearms and which
15 was marked into evidence at the last trial as
16 Government Exhibit 16.

17 MR. REIF: The problem with that is, it doesn't
18 deal with the question of how Mr. Korenco came to take
19 the statement in the first place.

20 THE COURT: How long would it take you to find
21 out how long it would take to make the affirmative
22 statement for both?

23 MR. LEVIN-EPSTEIN: I'm not sure I understand
24 the Court's request.

25 THE COURT: How long would it take you to try

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2 to eliminate the last vestige of a claim for not
3 testifying?

4 MR. LEVIN-EPSTEIN: As to an all agency check,
5 I can find that out by picking up the phone --

6 THE COURT: Do that.

7 MS. PIEL: May I be heard just one moment?

8 THE COURT: Not until the call is made.

9 MS. PIEL: It has to do with the same issue,
10 your Honor.

11 THE COURT: I don't care. I am asking Mr.
12 Levin-Epstein to make a call.

13 MR. LEVIN-EPSTEIN: Shall I have Mr. Pattison
14 come down?

15 THE COURT: No. Ask him if there is an
16 electronic way of doing it -- pressing a button and
17 finding out if anyone by this man's name was ever
18 surveilled.

19 MR. LEVIN-EPSTEIN: Mark Kondo as well, your
20 Honor?

21 THE COURT: That's right.

22 (Pause.)

23 MR. LEVIN-EPSTEIN: Mr. Pattison isn't sure how
24 long it would take. He cannot say with any certainty
25 how long it would take.

1
2 THE COURT: Is there a way of --

3 MR. LEVIN-EPSTEIN: Mr. Pattison indicates,
4 your Honor, -- and I am quoting directly from him --
5 to his knowledge and in his opinion it would take at
6 least a number of weeks for the letters to go back and
7 forth.

8 THE COURT: That's the reason for doing it.

9 Can I get a representation orally?

10 MR. LEVIN-EPSTEIN: Your Honor anticipates
11 Mr. Pattison's next statement which is that he feels we
12 might be able to get an oral representation from the all
13 agency check within a number of days but he can only
14 say it would be done orally and not within the
15 configurations of the guidelines set down by the
16 Department of Justice in the guidelines for an all
17 agency check.

18 Mr. Pattison indicated he'd rather come down
19 than do this over the telephone.

20 THE COURT: Ask him to come down right now.

21 MS. PIEL: Would now be an appropriate time to
22 address your Honor?

23 THE COURT: I have nothing else to do, Ms. Piel,
24 so go ahead.

25 MS. PIEL: With regard to the all agency check

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Yanagita-direct

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1 and electronic surveillance, you will recall that
2 initially, Mr. Leibowitz made a motion with regard to
3 electronic surveillance under Rule 16 and I joined in
4 on behalf of Elizabeth Jane Young Chin.
5

6 THE COURT: Yes. What did the Government say?

7 MS. PIEL: The Government said, as I recall --
8 and it's not too clear -- but Mr. Levin-Epstein re-
9 affirmed he has no personal knowledge of any electronic
10 surveillance.

11 I have no idea of what the record might reveal.

12 In other words, I can make no affidavit nor can
13 my client, that we have any knowledge of any information
14 that would lead us to believe there was electronic
15 surveillance -- nothing specific.

16 However, it would seem to me that since the
17 motion was made that the Government has an obligation
18 to state on the record before this trial starts what
19 an all agency check would reveal with regard to the
20 electronic surveillance and the defendants in this
21 case.

22 THE COURT: Are you making that motion now too,
23 Ms. Piel?

24 MS. PIEL: Yes.

25 We made it and if it is clear that an all agency

1
2 check was made I, of course, withdraw any motion now.

3 THE COURT: What you wanted was on discovery --
4 whether there was any electronic surveillance
5 Mr. Levin-Epstein knew of and he answered that and now
6 you are making --

7 MS. PIEL: I never understood that when
8 Mr. Levin-Epstein made a representation he was not
9 doing so on behalf of the Government. That may be
10 my misapprehension.

11 In any event, since the request was made it
12 seems to me there has been adequate time since the
13 request was made to determine actually whether or not
14 there was any electronic surveillance and if so, we
15 were entitled to know about it.

16 THE COURT: How did you go through the last
17 trial and survive it? Why come at this time, months
18 later --

19 MS. PIEL: Because the issue was raised only by
20 Mr. Levin-Epstein saying he has no personal knowledge.
21 I understood that applied to the Government. Then, I
22 have no position here.

23 But, if there is electronic surveillance we
24 don't know about it --

25 THE COURT: Mr. Reif raises it for a different

1
2 reason, for the reason I stated on the record.

3 MS. PIEL: This issue was raised long ago -

4 THE COURT: And it was answered. Now, it's
5 set at rest.

6 MS. PIEL: I'm not sure because today
7 Mr. Levin-Epstein said he doesn't want to know about
8 it --

9 THE COURT: Ms. Piel, if you want to make
10 further motions, do it on written papers and I'll know
11 what you are talking about.

12 MS. PIEL: Just that it's clear that I made it
13 orally now.

14 MR. LEVIN-EPSTEIN: The Government represents
15 that the only person in the Courtroom is me, represent-
16 ing the Government and anything I represent is made
17 on behalf of the Government.

18 It's Mr. Leibowitz's motion in which Ms. Piel
19 joins, made under Rule 16 and the Government represented
20 -- and contradiction with its own practice -- informally,
21 that it's aware of no electronic surveillance, first of
22 all, directed against Mrs. Chin -- Miss Young at that
23 time -- and her husband, Mr. Chin.

24 The Government is still not aware of any
25 electronic surveillance involved with either or both of

these two people.

The motion to be made here is a motion for electronic surveillance under an entirely different section which as far as the defendants are concerned, is untimely and secondly, stands well within the same representation I made as to Mr. Yanagita.

MS. PIEB: Was that a representation that a check was made by the Government?

MR. LEVIN-EPSTEIN: Absolutely no all agency check has been made has been demanded, has been agreed to and nor is it justified in this matter.

(Continued next page.)

1 THE COURT: Mr. Pattison?

2 MR. PATTISON: Yes, your Honor.

3 THE COURT: Two witnesses have been subpoenaed:
4 Michael Yanagita and Mark Kondo and today, this morning,
5 the return day of subpoena, counsel make motions on
6 behalf of both witnesses for an order requiring the
7 Government to affirm or deny whether there was any
8 electronic surveillance at certain specific premises.

9 MR. PATTISON: May I just inquire, counsel for
10 whom?

11 THE COURT: Counsel for the witnesses.

12 MR. PATTISON: For the witnesses?

13 THE COURT: That's right.

14 MR. PATTISON: I believe -- and again, this is
15 on rather short notice -- that prior to the Court's
16 ordering such a search there must be minimum standard
17 or showing made --

18 THE COURT: They say something was wrong with the
19 phone and from that I am supposed to infer there was
20 electronic surveillance.

21 MR. REIF: That's not all that is contained in
22 the affidavit.

23 There is a representation to the effect that
24 Mr. Kondo was shown something by the ATF agent and it
25

1 was his understanding that the only way that agent
2 could have had that material was by listening in on
3 the telephone.

4 THE COURT: That was subsequent to the trial.

5 MR. REIF: Prior to the trial and it so
6 indicates in the affidavit.

7 THE COURT: I am reading from the affidavit:
8 At least on one of these occasions which occurred --
9 when did I try this case?

10 MR. LEVIN-EPSTEIN: April.

11 THE COURT: (Continuing) At least on one of
12 these occasions which occurred between July 29 and
13 October 4 was relevant to the subject matter of the
14 indictment in this case and to the statement I
15 subsequently gave to John Krenco.

16 MR. PATTISON: That doesn't match what I just
17 heard.

18 THE COURT: I thought you said the only way he
19 could have gotten that information was through the
20 telephone conversation?

21 MR. REIF: He is shown a piece of paper and
22 makes a statement in an affidavit that the only way the
23 agent could have gotten the information was through the
24 phone.

25 I thought your Honor read it. We can go through

1 it word for word --

2 THE COURT: You know, I commented on your
3 surliness before. I won't tolerate your insolence.

4 (Addressing court spectator) And you, young lady,
5 you stood up in the courtroom and raised your hand when
6 I made the ruling as to Mr. Bloom -- what is your name?

7 COURT SPECTATOR: Amy Gladstein and I was not
8 present at the time Mr. Bloom was here.

9 THE COURT: Well, then it was someone who looked
10 an awful lot like you. I seldom forget a face.

11 You raised your hand when I made the decision
12 with regard to Mr. Bloom --

13 MR. REIF: Your Honor, I have no intention to be
14 surly --

15 THE COURT: It just comes out that way.

16 MR. PATTISON: May I just say that this writing,
17 item No. 7, makes no reference to being shown anything
18 but merely indicates that the witness does indeed
19 probably have relevant evidence to offer this Court.

20 THE COURT: Well, let me ask you this --

21 MR. PATTISON: That's all it says.

22 THE COURT: Mr. Pattison, is there a way that
23 the Government can press one of the many electronic
24 buttons that refer to this witness and this defendant
25 and come up with an answer?

1 MR. PATTISON: Yes, yes, there is, your Honor.

2 THE COURT: How soon?

3 MR. PATTISON: That's the trouble.

4 I have had occasion to ask that these searches
5 be actually done in the past in a matter of days. It
6 can be done in a matter of days but it's a very arduous --

7 THE COURT: I thought it could be done in a
8 matter of minutes.

9 MR. PATTISON: All the agencies have to be
10 checked, your Honor -- drug enforcement, postal
11 inspection, FBI, Secret Service, CIA -- they must go
12 back over indices and records. They must make name
13 checks.

14 We can get a very fast answer as to whether or
15 not there was a wiretap on this man's phone. That can
16 be done rapidly.

17 THE COURT: You mean the wiretap order -- legal
18 or illegal?

19 MR. PATTISON: Yes.

20 THE COURT: That's all he is talking about.

21 MR. REIF: That's not all.

22 MR. PATTISON: Usually, lawyers are asking for
23 more than that --

24 THE COURT: Was he ever heard on any other wire-
25 tap, is a phone call coming in, going out, that all takes

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an awful lot of time. They can also check that but again, this takes -- they have to go over the name indices for virtually every wiretap ever had.

THE COURT: I'll tell you what I'm going to do. I am going to suspend now and direct that the witnesses, both Mr. Kondo who is in court and Mr. Yanagita be here -- to remain in the courtroom or else go out to lunch but come back and remain in the witness room and I'll call this again oh, about four o'clock.

In the meantime, I want you to take the affidavits and I'll hear an argument on sufficiency of the affidavits.

I have made a finding based on how this occurred and the date on which this was made and that was made in bad faith and solely for the purpose of disrupting the trial and avoiding the impact or frustrating the power of the Court to impose coercive punishment on this witness.

MS. PIEL: May I be heard?

THE COURT: On this? Are you interested in this witness?

MS. PIEL: No, no -- only with regard to the application I made previously because it seemed to me -- I have not seen this affidavit and I don't know what's in it but from what I heard, Mr. Kondo submitted

1 an affidavit in which he said that the FBI or law-
2 enforcement agencies learned about something only
3 because of listening in to a telephone call which had to
4 do with my client.

5 Now, I mean, I haven't seen it -- this is my
6 impression --

7 THE COURT: You know Mr. Reif. You have been
8 dealing with him.

9 MS. PIEL: I met him but he has not given me a
10 copy of his papers.

11 THE COURT: Ask him. The original will be filed.

12 MS. PIEL: Would your Honor ask Mr. Pattison to
13 make further inquiry with regard to electronic
14 surveillance --

15 THE COURT: You make the motion.

16 MS. PIEL: The motion has already been made prior.

17 MR. LEVIN-EPSTEIN: It was never made.

18 MS. PIEL: Electronic surveillance was requested
19 and the Government led us to believe that there was none.

20 MR. LEVIN-EPSTEIN: I would like to say for the
21 record that we have been candid --

22 THE COURT: An order was previously made on
23 April 13, 1976 in exactly the same form, granting
24 Mr. Yanagita use immunity and he wasn't compelled to
25 testify because a stipulation was entered into between

counsel.

But, I am going to ask someone from the U.S. Attorney's Office to argue the sufficiency of the affidavit and then I will continue the proceedings against both witnesses.

I want the witnesses to come back after lunch.

MR. PATTISON: I will also, even though the Court will not have ruled upon the issue at that time, I will initiate the search.

THE COURT: I'd appreciate that but more than that, if I can get a quick answer on whether this telephone was ever tapped --

MR. PATTISON: Yes. That I think we might be able to get fast.

THE COURT: This was under the Bureau of Alcohol, Tobacco and Firearms. That agency should be ready to give you a quick answer. They had jurisdiction over this; I assume if any taps were made or electronic surveillance conducted it would be through that agency.

MS. PIEL: I believe the Secret Service had a great deal to do with this case.

MR. LEVIN-EPSTEIN: We will check.

MS. PIEL: I hope your Honor will permit Mr. Pattison to check --

1 THE COURT: I won't restrain him but I won't
2 require it.

3 MR. PATTISON: On the surface, I don't believe
4 the crime charged in this case is one of the authorized
5 crimes for which wiretaps may be in fact issued under
6 the --

7 THE COURT: He is claiming an illegal wiretap,
8 you see.

9 Defense counsel is resourceful.

10 The jury is returning at two o'clock. I expect
11 counsel in here ready to proceed at two o'clock at
12 which time we will have opening statements.

13 In the meantime, do the other work necessary.

14 Step down, Mr. Yanagita.

15 I expect you will want to take a full hour for
16 lunch --

17 MR. REIF: Did your Honor say that you wanted
18 Mr. Yanagita back at four o'clock and Mr. Kondo as
19 well?

20 THE COURT: Chances are I won't hold a hearing
21 until then.

22 If you want to come back at three o'clock, come
23 back at three o'clock and be in the witness room.

24 You are directed to return and be in the witness
25 room at three o'clock. The same thing for Mr. Kondo

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1 and let the record show that you, Mr. Kondo, are
2 present in the courtroom.

3 (Luncheon recess taken.)
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1 Appeals will take care of that. This is not the
2 place to test out a ruling.

3 I ask the lawyers to just wait a few minutes
4 until the jury has left the Courthouse. You are
5 welcome to stay on the hearing of -- I want to pro-
6 nounce it correctly -- Yanagita and Kondo.

7 MR. LEVIN-EPSTEIN: They are right outside
8 the courtroom, your Honor.

9 THE COURT: Mr. Yanagita and Mr. Kondo are
10 present.

11 MR. REIF: My name is James Reif, co-counsel
12 with Amy Gladstein.

13 THE COURT: What have you been able to learn
14 in the meantime?

15 MR. PATTISON: What I have been able to learn
16 is that an official search, ^{all}annonagency search,
17 which is the normal method used now when a proper
18 motion is in fact made, would take approximately two
19 or so weeks. And that time would only be minimally
20 shortened by limiting the search to one or two
21 telephone numbers with names and addresses.

22 THE COURT: Will summer vacations increase
23 that time limit?

24 MR. PATTISON: Possibly it would because this
25 is all done in writing. Letters are sent to the

14 1 various offices involved. They conducted an exhaus-
2 tive index search. It is double checked and triple
3 checked.

4 Then the information is filtered back through
5 the main office, Justice Department of course, and
6 then it comes back to us.

7 What I have been able to ascertain as of now,
8 your Honor, is that the assistant in charge of the
9 case --

10 MR. LEVIN-EPSTEIN: The agent.

11 MR. PATTISON: The assistant in charge of the
12 case has no knowledge of any such method being used.
13 The agent in charge of the case, Mr. ^{Raber} Arraba, also
14 has no actual knowledge of any sort of method similar
15 to those being used, and I have been able to check
16 with the office itself and they have been able to
17 check with the national office and --

18 THE COURT: Which office?

19 MR. PATTISON: Bureau of Alcohol, Tobacco &
20 Firearms, the agency in charge of the case. And I
21 would hand up my affidavit reflecting my efforts of
22 the past hour or two.

23 I also hand Mr. Reif a copy of my affidavit
24 indicating that search.

25 I believe, your Honor, that even assuming this

15 1 motion has any relevance to the trial presently under
2 way now, that that answer is in fact adequate under
3 the case of the United States against Grusse, which
4 I feel is the closest --

6 THE COURT: I have that.

7 MR. PATTISON: 515 F. 2d 157.

8 THE COURT: Second Circuit.

9 MR. PATTISON: Yes. I would point out that
10 in that case the Court speaks of the need to maintain
11 an orderly Grand Jury process, investigatory function,
12 and certainly when we are talking about an actual
13 petit jury trial that need is enhanced and increased.
14 The jury has been picked here and it has been sworn.
15 There is certainly a greater need that time not be
16 wasted now. And, your Honor, I think that the show-
17 ing that we can and will make now is adequate in
18 light of the relatively vague questions asked.
19 That is, the motion is triggered and premised upon
20 nebulous facts such as having trouble with a phone
21 which I am sorry to say is probably a relatively
22 common occurrence, and the fact that a question was
23 asked which it is assumed could only have been asked
24 as a result of having overheard telephone calls.

25 The Grusse case is almost right on point as
far as the nature of the basis upon which the search

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was asked for.

THE COURT: Must call your attention to United States 'against Alter --

MR. PATTISON: Yes.

THE COURT: -- upon which these affidavits are based on what makes out a prima facie case.

Grand Jury witness affidavits which, among other things, recite that the witness has heard successive rapping clicking sounds during two telephone conversations, that a friend of the witness was asked by FBI about an alleged telephone conversation between witness and herself on a specified date, and FBI arrived at a certain site just as witness and his companion were departing following a meeting they had arranged by telephone, made prima facie showing on described occasion someone was interfering with telephone calls and the Government was involved.

The burden was on the Government to affirm or deny these charges.

It comes pretty close to the facts in the case.

MR. PATTISON: But close on the side of being less than that shown in Alter, of course.

THE COURT: I am just suggesting it is a pattern.

MR. PATTISON: Of course, your Honor. But I

1
2 suggest also that there are remedies available. A 175 ---143 172

3 THE COURT: Here is another case in the First
4 Circuit --

5 MR. PATTISON: Is that the Evans case?

6 THE COURT: Hodges.

7 MR. PATTISON: I came across that. I did not
8 feel that it took anything away from the Grusse case
9 which was the most recent Second Circuit case I could
10 find on the particular case.

11 I also point out again that we are talking
12 about a trial here and not a Grand Jury investigation
13 which may go on and on and on.

14 THE COURT: Mr. Pattison, I will put the full
15 background of this case down when I am through after
16 I hear Mr. Reif. It is more than just a trial.

17 MR. PATTISON: I also cite Rule 12-F. I
18 think that the motion is not on time, of course.

19 THE COURT: What is on time? That is the
20 question. Because I just read 12-B(3); it says that
21 motions to suppress must be made before trial. This
22 is not really a motion to suppress. It doesn't fit
23 into any neat category.

24 MR. PATTISON: I think that that fact alone
25 gives rise to the next step, which is that any remedy
available concerning any charge of wiretapping does

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18 1 exist, a claim can be made under Title 18 Section
2 2520 if such a claim can be made in good faith. That
3 has nothing to do with the trial here. That is that
4 that can be a separate action.

5 But certainly, neither of the parties on
6 trial here may object now. And they have not ob-
7 jected.

8 I believe that the papers such as they are
9 make out a prima facie showing as if any more were
10 actually called for, that they do have relevant evi-
11 dence. As a matter of fact, one of the papers indi-
12 cates that they had a talk with the person on trial
13 about the facts here. That alone gives a showing of
14 relevancy here. I feel that the timing here is
15 clearly designed to upset this trial and disrupt it.
16 Certainly it could have been a week ago or two weeks
17 or prior to the last trial. But it was not.

18 THE COURT: I will hear Mr. Reif.

19 MR. REIF: Let me -- if I may. Perhaps what
20 I want to say is just a review of this morning, I
21 realize after our discussion there was perhaps some
22 confusion between yourself and me as to which affi-
23 davit I was referring to at the time. Let me say
24 that the basis for the motion made by both Mr.
25 Yanagita and Mr. Kondo is premised upon two facts.

19 1 One is that each has had a series of difficulties with
2 their respective home phones, some of which are not
3 explainable by the normal difficulty one encounters
4 with one's phone.
5

6 Secondly, Mr. Yanagita is of the view, as is
7 Mr. Kondo, that the questions that they may be asked
8 and which the United States Attorney what is the
9 subject matter of the questions to be asked, are
10 both of the view that those questions may be based
11 directly or indirectly upon electronic surveillances
12 of each of them. That is based upon Mr. Yanagita's
13 case as he states in the affidavit during the time
14 he was having difficulty with his phone, that he
15 had several telephone conversations with one of the
16 defendants in this case, at least one of which was
17 relevant to the subject matter of the indictment
18 and to the statement that Mr. Yanagita subsequently
19 gave to Mr. Korenco on October 24th.

20 This has led him to the view that he may have
21 been overheard by an electronic surveillance. This
22 might be attributed to Mr. Korenco's interrogation
23 and taking that statement.

24 THE COURT: Is there any other explanation
25 you can think of for Mr. Korenco getting the state-
ment and having the statement?

20 1 MR. REIF: I have never met Mr. Korenco, I am
2 not aware of the circumstances.

3 THE COURT: I thought the affidavit said that
4 the only place they could have gotten the information
5 was through a telephone call.

6 MR. REIF: That relates to Mr. Kondo's affi-
7 davit. I will address myself to that now. As to
8 Mr. Kondo, also during the time he was having diffi-
9 culty with his phone, he was --

10 THE COURT: How is Mr. Yanagita saying he knows
11 that the information that Mr. Korenco got was through
12 a telephone call?

13 MR. REIF: What I am saying is that his view
14 is that the questions he was to be asked at this trial
15 are based upon electronic surveillances and that is
16 founded upon his view that the questions he was
17 asked by Mr. Korenco and the subject matter of this
18 case both are relevant to conversations that he had
19 with one of the defendants.

20 THE COURT: We have Mr. Yanagita's statement.
21 All he need say is that is the very thing I discussed
22 with the defendant, right?

23 MR. REIF: No, sir. We are not claiming that
24 that establishes prima facie a taint in this case.
25 What we are saying is that is a sufficient allegation

to require the Government to come back and say --

THE COURT: I know what you are saying.

MR. REIF: They would not expect your Honor to take that as proof of taint.

THE COURT: All you are saying is you want to put the Government to its proof that there was no surveillance. You want the two or three weeks in order to get the proof.

MR. REIF: No, sir.

THE COURT: You want the proof?

MR. REIF: Taking into account that the Government is the agency with the facts and that a witness or criminal defendant cannot be entitled to prove there was electronic surveillance before he can force the Government to prove there was none -- the burden then shifts and that is the purpose 3504 was enacted, because Congress --

THE COURT: You leave out one balancing factor: the problem that the Court has in trying the cases.

MR. REIF: No. That's why I said the courts have said there has to be a minimal showing --

THE COURT: Time means nothing, you are saying, is that correct?

MR. REIF: Once the minimal showing has been made the balance shifts.

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THE COURT: I am talking about time for making the motion. You know what I mean.

MR. REIF: As I said to your Honor this morning, we filed the motion and today is Monday and we learned about the facts on Friday --

THE COURT: I will say more about that when you get through. I don't believe that at all.

MR. REIF: Mr. Levin-Epstein can represent to your Honor that I had several conversations with him in which I told him Mr. Condo had to come to New York early because I had not spoken to him and Mr. Levin-Epstein spoke to the marshals in Los Angeles to arrange for Mr. Condo to come in early and he flew in Thursday and I met him Friday.

THE COURT: These conversations, they say, were held between July and October of 1975.

The last trial was April 1976 and they were both here.

MR. REIF: Mr. Condo was not here.

THE COURT: He was subpoenaed and he never showed?

MR. LEVIN- EPSTEIN: We never could subpoena him.

THE COURT: Mr. Yanagita was here and we are going through a proceeding and the final result

1 of that proceeding would have been -- and it was
2 clearly indicated -- that he'd be held in contempt
3 of court. He knew all about the clicking if it ever
4 happened.

5 Suddenly, he comes in -- you get through with
6 your argument because I have got a whole list of
7 findings against you, Mr. Reif, and your client but
8 I emphasize you.

9 MR. REIF: If your Honor is already disposed
10 to deny our motion, I won't take up the time of the
11 Court.

12 THE COURT: You can take up a little more to
13 make the records because I can see it's going to the
14 Court of Appeals and I want to put enough on the
15 record so they know the type of problems we have.

16 MR. REIF: Your Honor is free to put on the
17 record --

18 THE COURT: If you have said everything you
19 want I will start saying what I want to say.

20 MR. REIF: Based on what I have said now and
21 the affidavits, what we are asking for, essentially,
22 is for a determination as to whether or not there
23 has been an electronic surveillance of either of
24 the witnesses or of their home premises.

25 We are not asking for a list of twenty

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premises and claiming they have standing to object.

We are restricting it to the question of the witnesses and their home premises during the time in question of this case, which means the first date mentioned in the affidavit -- I'm sorry -- the indictment, which is July 28, 1975 or whenever the investigation began, to the present time. That's our request.

We think that based on the obvious fact that a witness can never show conclusively on their own that they were the subject of an electronic surveillance, that the showing is sufficient to make the Government check with the appropriate agency and give us a response.

I am not insistent that the Government check every agency in the federal government, but we feel it is appropriate to check, at the very least, the agencies involved with the case, of which there are three: the Bureau of Alcohol, Tobacco & Firearms, the Secret Service, and the FBI.

If there were others, we would ask they be inquired of also.

THE COURT: Orally or a written report?

MR. REIF: Let me say something about that.

I think that is significant. Counsel stressed that

1
2 all this is done in writing now and very carefully
3 and exhaustively.

4 Counsel neglected to explain to the Court that
5 represents a change in policy and to explain the
6 basis for the change in policy; it used to be done
7 orally and quickly and routinely.

8 The policy has changed because the Government
9 has been forced to face the reality that in several
10 cases it has made a quick oral response which turned
11 out to be incorrect.

12 THE COURT: So you want a written response.

13 MR. REIF: Yes, to state the fact, not to the
14 best of its knowledge it has the records or doesn't
15 have the records --

16 THE COURT: I understand you absolutely, Mr.
17 Reif. You made your purpose clear.

18 MR. REIF: I'm not saying it needs to be written
19 but it needs to be sworn to.

20 If the person who is the appropriate person
21 to make the representation wants to make it in writing
22 I have no objection. Nor do I have any objection if
23 the same person made oral representations. But, we
24 think it is appropriate that the representation to the
25 Court be made as a sworn statement.

THE COURT: Anything else?

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1 MR. REIF: No, sir.

2 THE COURT: All right.

3 MR. PATTISON: May I just add one or two facts?

4 THE COURT: Go ahead.

5 MR. PATTISON: I fail to see what the remedy
6 is which is actually being sought here.

7 This search can occur -- we can and will make
8 it -- but what does that have to do with whether the
9 witness should be a witness here?

10 THE COURT: He says -- apparently, the illegal
11 electronics surveillance or the wiretaps -- however
12 it might have been accomplished -- the claim is that
13 it led to this evidence and therefore it is not ad-
14 missible.

15 MR. PATTISON: Well, how can he oppose that?
16 Ms. Piel can. They have been granted immunity or
17 they will be, both of them, granted immunity and thus
18 they are not a party aggrieved under 3504 once that
19 grant of immunity is ordered.

20 Now, is Mr. Reif saying that his clients will
21 not abide by the process of this Court?

22 THE COURT: Well, I got that distinct feeling.

23 MR. PATTISON: I would like a clarification
24 on the record.

25 THE COURT: I don't think that should be made

1 until I reach it.

2 MR. PATTISON: Very well, your Honor.

3 THE COURT: I find that this is not the first
4 time that Yanagita, through Mr. Reif, made an un-
5 timely application designed to disrupt the trial.

6 When the last trial was about to start, indeed,
7 as I recall it, the very day Mr. Reif moved to quash
8 the indictment --

9 MR. LEVIN-EPSTEIN: The subpoena.

10 THE COURT: I mean the subpoena.

11 MR. REIF: I never made a motion prior to today
12 to quash any subpoena -- written or oral.

13 THE COURT: Well, when Mr. Yanagita was called
14 to testify he asserted his Fifth Amendment right then
15 and you delivered an affidavit that morning, and as I
16 recall it, it was an assertion of a Fifth Amendment
17 right based on a claim that the Japanese Government
18 would move to extradite the witness and charge him
19 with a crime under Japanese law.

20 I have the memorandum here. Unfortunately,
21 it wasn't stamped "Filed" -- I don't know why it
22 wasn't -- and the two grounds are that the testimony
23 would tend to incriminate Yanagita; that there was
24 a possibility of Japanese prosecution; the Fifth
25 Amendment privilege protects him from testifying.

1 The extended argument I recall was because
2 of the possibility or probability of the charge under
3 Japanese law.'

4 Now, whether it was in the form of a motion
5 to quash the subpoena or an assertion of the Fifth
6 Amendment right, I'm not aware. But I think the
7 day before Mr. Yanagita was told that his Fifth
8 Amendment right was protected by an act of immunity
9 and that would be so and that would require him to
10 testify and I indicated to him that if he failed
11 under a grant of immunity that he would be placed
12 in custody as a coercive measure to compel his
13 testimony.

14 I remember that very morning -- I think it
15 was the next day -- now, I may have the time sequence
16 a little off -- but the very morning he was to
17 testify Mr. Reif handed me this memorandum consisting
18 of nine pages and an affirmation and exhibits -- I
19 see an affidavit by him -- and at that time I told
20 him that he had a certain duty to the Court as well
21 as to his client; that he could protect his client's
22 rights without disrupting this Court's procedures.

23 It so happens that matter was disposed of
24 through some stipulation the Government entered
25 into so the point was never pressed.

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1 Was it April 21st that this mistrial was de-
2 clared or about then?

3 THE CLERK: April 16.

4 THE COURT: I put that case down for trial --
5 I don't recall if I did it at that time but Ms. Piel
6 will recall whether or not I did say on that date,
7 trial, June 21 --

8 MR. LEVIN-EPSTEIN: I can tell you the exact
9 date, if you wish.

10 The case was set down on April 19th for trial
11 on June 21st.

12 THE COURT: April 19 for trial June 21.

13 Mr. Reif surely must have understood that his
14 client would be a witness in this case -- certainly,
15 Yanagita -- I don't know when he undertook to repre-
16 sent Mr. Condo -- but if he wasn't advised then he
17 certainly was advised on or about May 18, more than
18 a month ago.

19 Now, Mr. Yanagita was served with a subpoena.
20 He understood he'd have to testify.

21 He claims that these conversations took place
22 between July 29 and October 4. Mr. Reif offers the
23 excuse that it didn't occur to him that this clicking
24 -- and again I'll cite the Alter case which is the
25 kick-off -- U.S. v. Alter, 482 F 2d 1016, 9th Circuit,

1 1973 -- this clicking might have been evidence of
2 electronic surveillance. I reject that.
3

4 I think, again, it's the way Mr. Reif practices
5 law. He thinks a surprise tactic is the best way to
6 represent his client.

7 I find that the motion comes too late. More
8 than that, in balancing the factors and the equities,
9 the affidavit of Mr. Pattison indicating that the
10 Bureau of Alcohol, Tobacco & Firearms made an investi-
11 gation and found no electronic surveillance on Mr.
12 Yanagita's telephone and Mr. Condo's telephone,
13 suffices.

14 I direct the attention of the Court of Appeals,
15 if this record goes to the Court of Appeals, to this
16 practice that I think should be condemned in no un-
17 certain terms.

18 Now, Mr. Yanagita, will you please come forward.

19 (Michael Yanagita complies.)

20 THE COURT: Mr. Yanagita, I denied your motion
21 which would call on the Government under Section 3504
22 to make an agency search to show that there was no
23 electronic surveillance.

24 Will you please take the stand.
25

Yanagita - direct

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M I C H A E L Y A N A G I T A, having been previously
sworn by the clerk of the court, resumed the witness
stand and testified further as follows:

MR. LEVIN-EPSTEIN: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Yanagita, do you know the defendant Eliza-
beth Jane Young now known as Elizabeth Jane Young Chin?

A I take the Fifth Amendment.

Q Do you know the defendant Kenneth Raymond Chin?

A Excuse me?

(Continued on next page.)

Yanagita-direct

1 A 190

2 Q

Do you know the defendant Kenneth Raymond Chin?

3 A

On the grounds counsel stated, I refuse to
4 testify under the Fifth Amendment.

5 THE COURT: I direct you to answer the ques-
6 tion: "Do you know the defendant Kenneth Raymond Chin?"

7 And I direct you to answer the question:
8 "Do you know the defendant Elizabeth Jane Young now
9 known as Elizabeth Jane Young Chin?"

10 I direct you to answer.

11 THE WITNESS: I refuse to testify on the grounds
12 of the Fifth Amendment and the testimony that I heard.

13 THE COURT: You understand that you have been
14 granted use immunity. There isn't a choice, you
15 must testify. No witness has a right to withhold
16 information except on a proper assertion of the
17 Fifth Amendment and I have found you may not assert
18 the Fifth Amendment. Do you understand that?

19 THE WITNESS: (No response.)

20 THE COURT: I want you to answer.

21 THE WITNESS: Yes.

22 THE COURT: You understand that the refusal
23 to answer on the direction of the Court constitutes
24 a contempt of court?

25 THE WITNESS: Yes.

THE COURT: You understand that the Court may commit you to jail until such time as you answer but not longer than the length of the trial? Do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Knowing all that, you refuse to answer?

THE WITNESS: Yes.

THE COURT: Would you answer any other questions put to you by the Government concerning the matters in issue?

THE WITNESS: I don't understand.

THE COURT: If Mr. Levin-Epstein asked you other questions concerning the acquisition of guns by the defendants or either of them, would you refuse to answer those questions?

THE WITNESS: Yes.

THE COURT: Will you ask one direct question as to whether he sold a particular gun. Would you ask a question based on the statements he gave so that there is no question about it.

MR. LEVIN-EPSTEIN: Yes, your Honor. I am now, referring, your Honor, for the record, to the document which has been previously marked in the

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Yanagita - direct

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last trial Government's Exhibit 16 in evidence.

THE COURT: I want you to ask the specific questions.

BY MR. LEVIN-EPSTEIN:

Q Mr. Yanagita, directing your attention to the middle of August of 1975, did there come a time during that month or approximately around that month when you sold or delivered to Elizabeth Jane Young a Armalite AR-7, serial No. 89474, or an M-1 .30 caliber carbine, serial No. 5487136, or either of those guns?

A I refuse to testify on the ground that my counsel has stated.

Q Are you refusing to answer on grounds of the fifth Amendment?

A That, too.

THE COURT: You understand if your counsel is wrong you are in contempt of court? You understand that?

THE WITNESS: Yes.

THE COURT: I direct you to answer that question.

THE WITNESS: Which question?

THE COURT: The last question, did you sell those two guns?

4 1 Yanagita - direct A 193 130161

2 THE WITNESS: I refuse to testify on the
3 grounds of what my counsel stated.

4 THE COURT: You understand the refusal to
5 answer on the direction of the Court may result in
6 contempt of court?

7 THE WITNESS: Yes.

8 THE COURT: I find that the witness Michael
9 Yanagita is in contempt of court for willful refusal
10 to answer questions properly posed by the Court.

11 I direct the witness to return to the court
12 at 9:15 tomorrow morning. I will give you one last
13 opportunity to answer the question. If you fail
14 to do it, I intend to commit you to the custody of
15 the Attorney General or the Marshal for the Eastern
16 District of New York. And I ask you, Mr. Levin-
17 Epstein, to prepare a commitment order.

18 I also direct you, Mr. Reif, to immediately
19 prepare a notice of appeal. I will stay the order
20 until two o'clock. You can run over to the Court
21 of Appeals and argue it. And failing any extension
22 of the stay, I intend that this witness be committed
23 for the term indicated unless he changes his mind
24 by tomorrow morning.

25 Do you understand the full implication of

what I said, Mr. Yanagita?

THE WITNESS: Yes, I do.

THE COURT: I don't say that's not the exclusive remedy; there may be others but I will leave that to the United States Attorney. I am declaring this to be a contempt of court in the presence of the Court.

You may step down.

(Witness excused.)

THE COURT: Now, Mr. Kondo. I want the United States Attorney to be prepared to argue that immediately over at the Second Circuit.

MR. LEVIN-EPSTEIN: Steps will be taken to argue the point at the Court's pleasure.

THE COURT: I don't want any lengthy statement, it is a short trial. If a witness refuses after a grant of use immunity, I want him to taste a sample of jail. I want the Government to look into any other violations that it may draw because of the contempt.

MR. LEVIN-EPSTEIN: Very well, your Honor.

THE COURT: Swear in Mr. Kondo.

Condo - direct

M' A R C C H O Y E A C O N D O, a witness called herein, was sworn by the clerk of the court and testified as follows:

THE COURT: One more thing. I think it is only fair to tell Mr. Yanagita -- I think I saw here that you are a junior majoring in biology and intend to study medicine. Is that true?

MR. YANAGITA: Yes.

THE COURT: I am not using this as an extra threat, I don't know how it is going to affect your future, but that is the chance you are taking, the chance you are taking that your lawyer is right.

MR. YANAGITA: Yes.

THE COURT: Now that you understand, I know who is taking the chances.

Please sit down, Mr. Condo.

MR. LEVIN-EPSTEIN: May I proceed, your Honor?

THE COURT: Please do.

DIRECT EXAMINATION

BY MR. LEVIN-EPSTEIN:

Q Mr. Condo, do you know the defendant Elizabeth Jane Young, now known as Elizabeth Jane Young Chin?

A I decline to answer on the basis of the Fifth Amendment.

A 196

Condo - direct

THE COURT: First, I want you to know that I denied your motion on quashing the subpoena on the grounds that the defendants have a Fifth Amendment right to a claim of double jeopardy. That is totally irrelevant to you.

More than that, more ^{pointedly} poignantly, I denied your motion requesting the Government for an order directing the Government to affirm or deny whether there was any electronic surveillance.

Do you understand that?

THE WITNESS: Yes, I do.

THE COURT: Now, you refuse to answer the question?

THE WITNESS: That's correct.

THE COURT: What is the next question?

Q Mr. Condo, directing your attention to August 12, 1975, on that day, did you purchase an AR-180 rifle, serial No. S12590, at Coles Sporting Goods Store in Inglewood, California?

A I decline to answer on the basis of the Fifth Amendment.

THE COURT: This witness has not been given use immunity.

MR. LEVIN-EPSTEIN: It is anticipated the

Government would move this Court as soon as it is correct and proper for a granting of use immunity under Section 6002 and 6003.

THE COURT: You don't have that authorization at the present time?

MR. LEVIN-EPSTEIN: I do have the authorization to make the motion. However, the papers have not yet been prepared.

I will make the motion orally and pursuant to this Court's authority based upon the section in Title 18 I already stated, and other authorities, I now so move this Court, having received the necessary authorization from the Department of Justice.

THE COURT: May I see it?

MR. LEVIN-EPSTEIN: Yes, your Honor.

I will represent this is a telecopy facsimile of the actual authorization authorizing us to make a letter which is --

THE COURT: On both motions, will you please mark Mr. Pattison's affidavit as an exhibit --

THE CLERK: So marked as Government Exhibit 22 for identification.

THE COURT: May I have the section?

MR. LEVIN-EPSTEIN: 6002 and 6003.

THE COURT: May I see it? I want to make certain an oral order can be entered. I want to make sure it doesn't forbid it. I have never made an oral order but I see no prohibition against it.

Based on the authorization dated June 18, 1976, giving the United States Attorney authority to apply to this Court for an order requiring Marc Condo to give testimony and provide other information in the matter of United States against Chin and Young, I so order.

And you understand that I just granted you use immunity, which means that no testimony or information compelled under this order may be used against you in any criminal case except the prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

And in fact, what it means is that your claim of a right against self-incrimination is no longer a bar to compelling testimony.

Do you understand that, Mr. Condo?

THE WITNESS: Yes.

THE COURT: Do you understand what I am saying?

THE WITNESS: Yes. You are telling me if I answer I won't be prosecuted for anything.

Condo - direct

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3 THE COURT: I am saying that the order I just
4 made orally takes from you the right to assert the
5 Fifth Amendment as a ground for refusing to answer
6 because what it does is it says that anything that
7 you say in response to any questions in this trial
8 may not be used against you directly or indirectly.
9 Any testimony that is obtained by reason of the
10 testimony you give. That's what we mean by use
11 immunity.

12 MR. REIF: Your Honor, could I see the author-
13 ization? Would that be possible?

14 THE COURT: Mark it.

15 THE CLERK: I will mark it as a government
16 exhibit?

17 THE COURT: Yes.

18 THE CLERK: So marked as Government's Exhibit

19 21.

20 (So marked.)

21 (Continued on next page.)
22
23
24
25

xxx

1 A 200

Condo - direct

2 THE COURT: I'm sorry. I have a judges'
3 meeting at five o'clock and it's just five.

4 Pose the questions, Mr. Levin-Epstein, so I
5 may advise the witness as to just what is in store
6 for him if he fails to answer.

7 MR. REIF: For the record, we would object
8 to your Honor's entry of the order now.

9 We feel it should be done on papers but we
10 also feel that -- I believe -- the statute sets
11 forth who are the appropriate persons who can author-
12 ize an application to the Court and I do not believe
13 an acting assistant attorney general is one of those
14 persons.

15 So, I would object to the Government's appli-
16 cation for the order and to the order on that ground.

17 I would also like to incorporate with respect
18 to Mr. Condo, the record of the underlying criminal
19 trial and the papers submitted on behalf of Mr.
20 Yanagita with respect to the incrimination under the
21 laws of the foreign country.

22 I would simply incorporate that submission
23 to your Honor here.

24 THE COURT: Objection overruled.

25 Please put the questions, Mr. Levin-Epstein.

Condo - direct

198169

A 201

EXAMINATION BY MR. LEVIN-EPSTEIN:

Q Mr. Condo, do you know the defendant Elizabeth Jane Young Chin, formerly known as Elizabeth Jane Young?

A I decline to answer on the ground asserted by my attorney.

THE COURT: You mean the answer would tend to incriminate you?

MR. LEVIN-EPSTEIN: Is that under the Fourth or Fifth Amendment or what?

MR. REIF: The Fifth Amendment privilege against self-incrimination and the objection we made with respect to the adequacy of the Government's response on the statutory question on the subject of electronic surveillance and the objection I stated a moment ago.

THE COURT: Mr. Condo, you are directed to answer. You are directed to answer the question as to whether you know the defendant Kenneth Raymond Chin. Will you answer that question?

THE WITNESS: I decline to answer on the basis of the grounds laid before the Court by my attorney.

THE COURT: You understand that the refusal to answer at the Court's direction may amount to a contempt of court?

1

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THE WITNESS: Yes.

3

4

THE COURT: And that you may go to prison
for it?

5

THE WITNESS: (Indicating affirmatively.)

6

THE COURT: Answer orally.

7

THE WITNESS: Yes.

8

9

THE COURT: Do you know the defendant Elizabeth
Jane Young now known as Elizabeth Jane Young Chin?

10

THE WITNESS: I refuse to answer.

11

12

THE COURT: You understand that your refusal
to answer the Court's question and obey the Court's
direction amounts to a contempt of court?

13

14

THE WITNESS: Yes.

15

16

THE COURT: And the Court could commit you
to jail for contempt of court; you understand that?

17

THE WITNESS: Yes, I do.

18

19

THE COURT: Ask one specific question that
involves this case, Mr. Levin-Epstein.

20

MR. LEVIN-EPSTEIN: Yes.

21

BY MR. LEVIN-EPSTEIN:

22

23

24

25

Q Directing your attention to August 12, 1975,
Mr. Condo, did you purchase from the Coles Sporting Goods
Store in Inglewood, California, serial No. S-12590 an
Armalite-180?

Condo - direct

A 203

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A I decline to answer on the grounds set forth
by my attorney.

THE COURT: I direct you to answer that ques-
tion. And do you understand a refusal to answer
amounts to a contempt of court?

THE WITNESS: I decline to answer.

THE COURT: I find that the defendant has
willfully refused to obey the directions of the
Court and he is in contempt of court.

You are directed to return here tomorrow at
9:15 and at that time I will give you a last chance
to purge yourself of the contempt and change your
mind. Think about it.

If you refuse to answer I intend to commit you
to the Metropolitan Correctional Center or to the
custody of the Attorney General of the United States
until such time as you answer but no longer than
six months or the duration of the trial of this
case and you can purge yourself at any time before
that time by answering.

Now, here, as in the Yanagita case, I expect
counsel to prepare a motion to stay the execution
of the commitment.

If this witness persists I intend to commit

A 204

Condo - direct

him immediately and stay execution until two o'clock.
That should give the lawyers two or three hours to
get over to the Court of Appeals and argue the
motions and I expect the United States Attorney to
be ready to argue it.

MR. PATTISON: We shall be ready.

THE COURT: You may step down.

9:15 tomorrow morning.

MR. LEIBOWITZ: Will the trial proceed?

THE COURT: The trial will proceed at ten
o'clock, yes.

MR. LEIBOWITZ: May I ask if the Court intends
to proceed on Friday? I heard that may be a motion
day.

THE COURT: No, this Friday is not a motion
day. July 2nd is a motion day.

THE CLERK: Requested inquiry on voir dire
examinations by the defendant Kenneth Raymond Chin
marked as Defendants' Exhibit G for identification.

(So marked.)

(Trial adjourned to June 22, 1965 at 10 A.M.)

JUNE 22, 1976

A 205 202¹⁷⁶

(The following occurred in the absence of the jury.)

THE CLERK: Michael Yanagita and Mark Kondo, come forward, please.

MR. REIF: Good morning, your Honor. Mr. Kondo hasn't arrived yet.

THE COURT: Mr. Yanagita, will you please take the witness stand.

M I C H A E L Y A N A G I T A , having been previously duly sworn, resumed the witness stand and testified as follows:

THE COURT: Let the record show it is now 9:30. I previously advised you that I would give you the opportunity to purge yourself of contempt.

If the same questions were asked of you would you answer them?

THE WITNESS: No, I wouldn't.

THE COURT: I direct you to answer -- conveniently the defendants have come to court early this morning -- Do you know the defendant, Elizabeth Jane Young Chin?

THE WITNESS: I refuse to answer on the grounds that my Counsel has stated yesterday.

THE COURT: And do you know the defendant Kenneth Chin?

A 206

1 THE WITNESS: I refused to answer on the grounds
2 that my Counsel has stated yesterday.

3 THE COURT: You understand that the Court is
4 directing you to answer and that a refusal to answer
5 is a contempt of Court?

6 THE WITNESS: Yes, sir.

7 THE COURT: The Court directs you to answer.
8 You still refuse to answer?

9 THE WITNESS: Yes.

10 THE COURT: I find the defendant in contempt of
11 Court and I direct he be committed to the Metropolitan
12 Correctional Institution for a period of one month or
13 to the time of verdict in this case on trial, whichever
14 event is first.

15 I am ready to sign a commitment order.

16 I will stay execution of the commitment until
17 2 o'clock to give the contemnor the opportunity to
18 apply for further stay or review of the matter in issue
19 by the Second Circuit Court of Appeals.

20 Do you have a commitment order?

21 MR. LEVIN-EPSTEIN: The commitment order I
22 prepared last night was in reference to the six months
23 your Honor mentioned. It is being typed now.

24 THE COURT: There's no problem with that. I can
25 change that. I can change the six to a one.

1 You remain in court until I sign the commitment
2 order.

3 MR. REIF: We were up quite late last night
4 attempting to prepare the papers. They are still not
5 quite complete.

6 We intend to file a notice of appeal immediately
7 and proceed as quickly as we can with the completion
8 of the papers.

9 It would help considerably if we might have at
10 least until 4 o'clock.

11 THE COURT: No, I won't do it.

12 I suspect everything you tell me, Mr. Reif,
13 because of the manner in which you brought this on,
14 and I think it is another ploy, so it will go over to
15 the next stage.

16 You can have as much time as you want, but you
17 get to the Court of Appeals before 2.

18 MR. REIF: It's a question of the Court having
19 the opportunity to read the papers --

20 THE COURT: You tell me what problems you have
21 in getting them to the Court of Appeals and how late
22 you get them to the Court of Appeals.

23 You had no trouble getting your affidavit and
24 motion ready dated January 21 and filed before me by
25 ten o'clock yesterday --

A 208

MR. LEVIN-EPSTEIN: Does your Honor mean June 21?

THE COURT: Yes. Did I say January?

The order came in all ready with the affidavit at ten o'clock on June 21.

MR. REIF: That's true, but that was on the basis of work done over the weekend and didn't require reading of a substantial amount of papers to familiarize your Honor with the record.

THE COURT: Two o'clock. I won't stay it beyond then.

I expect the Court of Appeals will be able to view it immediately. If they want to extend it, let them extend it.

MR. LEVIN-EPSTEIN: Arrangements have been made in my office to have an attorney available to argue this matter on behalf of the Government.

THE COURT: You may need your papers to make a record there.

MR. LEVIN-EPSTEIN: Copies of the papers have been provided the attorneys and will be going over to the Court of Appeals.

THE COURT: Make sure you have the oral order as to use immunity.

MR. LEVIN-EPSTEIN: The transcript has been xeroxed, those pages of it, and if it please the Court,

1 I will call the steno unit and see where the commitment
2 order is.

3 THE COURT: Can you account for the failure of
4 Mr. Kondo to be here?

5 MR. REIF: I assume he is on his way.

6 THE COURT: Do you know where he is living in
7 the meantime?

8 MR. REIF: I don't have the exact address and
9 he informed me there is no phone where he is staying.

10 MR. LEVIN-EPSTEIN: Your Honor, the Government
11 will take under advisement the possibility of requesting
12 that a bench warrant issue for Mr. Kondo's arrest
13 should he not appear soon.

14 THE COURT: He is twenty minutes late. We'll
15 wait.

16 MR. LEVIN-EPSTEIN: I'm sorry. I didn't hear
17 what your Honor said.

18 THE COURT: I said we'll wait. He is twenty
19 minutes late.

20 I will still take it if he gets here by ten
21 minutes to ten.

22 (Recess taken.)

23 (continued next page)
24
25

A 210

(After recess.)

(The following occurred in the absence of the jury.)

THE COURT: Both sides ready?

MR. LEVIN-EPSTEIN: Ready for the Government.

MS. PIEL: Ready for the defendant Elizabeth Jane Young Chin.

MR. LIEBOWITZ: Ready, your Honor.

MR. LEVIN-EPSTEIN: I have one or two preliminary matters.

MS. PIEL: I do, too, your Honor, if I may be heard.

MR. LEVIN-EPSTEIN: May the record indicate the absence of Mr. Kondo from the court room. It is now three minutes of ten.

THE COURT: All right. We will wait before I issue a bench warrant.

MR. LEVIN-EPSTEIN: Yesterday, your Honor, the Government requested of Ms. Piel that she look through her files to see if she has possession of the address book.

MS. PIEL: I have looked through my files and I do indeed have it.

I will turn it over to Mr. Levin-Epstein, but I'd like five or ten minutes to look through it.

JUNE 22, 1976

A 211

208

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1 which would seem more reliable than copies.

2 THE CLERK: Original statement marked Government
3 Exhibit 27 in evidence.

4 MR. LEVIN-EPSTEIN: If it please the Court, I'll
5 offer it again in the presence of the jury.

6 THE COURT: Yes.

7 Like they used to say on the program, Let's find
8 out.

9 MR. LEVIN-EPSTEIN: For the purposes of clarification --
10

11 THE COURT: Note Mr. Condo's presence here.
12 I understand he overslept and the Government wanted to
13 issue a warrant for your arrest and I delayed it until
14 now.

15 You're apparently aware that Mr. Reif is in the
16 Court of Appeals attempting to overturn the commit-
17 ment order and Mr. Reif told you that I did sign the
18 commitment order, did he not? He told you that?

19 MR. CONDO: Right.

20 MR. LEVIN-EPSTEIN: Based on Mr. Condo's appearance
21 here at 12:15 I ask that the bench warrant be vacated.

22 THE COURT: I never issued it.

23 MR. LEVIN-EPSTEIN: You issued it and stayed its
24 execution.

25 THE COURT: No, I did not. I signed the commit-

ment order on the contempt.

MR. LEVIN-EPSTEIN: My mistake.

THE COURT: The execution is stayed until 2 o'clock Mr. Condo, so you are welcome to stay here or you are directed to return at 2 o'clock just in case it's not overturned and at 2 o'clock you will be committed to the custody of the Attorney General provided the Court of Appeals has not extended the stay or overturned the order.

MR. LEVIN-EPSTEIN: I ask for his exclusion on the eventual possibility that he'll be a witness in this case, -- at this time, in other words.

THE COURT: Where should he go? His lawyers' in the Court of Appeals and the witness room is full of Government witnesses. I'll allow him to stay in the court room.

MR. LEVIN-EPSTEIN: Very well.

For clarity, may the typed version be marked Government Exhibit 16 for identification?

THE COURT: All right. Mark the original --

MR. LEVIN-EPSTEIN: The original is marked 27 in evidence. I ask that the typed version be marked 16 for identification.

THE COURT: All right.

THE CLERK: Marked 16 for identification.

June 22, 1976

A 213

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of this evidence, your Honor, of course.

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THE COURT: Seat the jury.

3

Are you ready to proceed with testimony?

4

MR. LEVIN-EPSTEIN: A moment, your Honor.

5

For the record, your Honor, I am informed by

6

Mr. Schall that our office was served with certain

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papers which he tells me were notices of an appeal

8

being taken before the Second Circuit.

9

It's now about three minutes of 2:00 and I have

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heard no result of that decision one way or the other.

11

THE COURT: Proceed with the case, please.

12

Do you have a witness?

13

MR. LEVIN-EPSTEIN: Yes, I believe so.

14

(Jury entered jury box.)

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(Continued next page.)

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June 22, 1976

A 214

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2 THE COURT: We will take a short recess. I
3 will call the jury back in a few minutes.

4 (The jury left the courtroom.)

5 THE COURT: Before I take you, Mr. Bergman,
6 I would like all requests to charge be submitted to
7 me before the end of the day tomorrow.

8 MR. LEVIN-EPSTEIN: No problem, your Honor.

9 THE COURT: I intend to charge obtaining a
10 permit issued by the City of New York under the--
11 what is it called?

12 MR. LEVIN-EPSTEIN: Firearms Control Board.

13 THE COURT: -- is not a defense to a federal
14 charge of transporting guns in the State of New York.

15 All right.

16 MR. BERGMAN: Your Honor, I spoke to Mr. Edward
17 Guidero, a senior clerk, regarding the motion of
18 Condo and Yanagita. The Court has taken no action
19 on the motion.

20 THE COURT: Has it been submitted?

21 MR. BERGMAN: Yes. I might add it was filed
22 sometime after we had received our copy, which was
23 12:40 today.

24 THE COURT: What time?

25 MR. BERGMAN: 12:40 today. I should say that

1 the Court of Appeals was under the misapprehension
2 that your order of contempt, because I suppose it
3 was entered for the first time this morning, was first
4 made known to the witnesses that it would be made --
5 so that I suppose under the impression that the two
6 o'clock -- the stay until two o'clock was not alto-
7 gether wide enough.

8 THE COURT: What?

9 MR. BERGMAN: Not wide enough. Didn't give
10 them enough latitude to seek relief.

11 I advised the clerk of the court we will sub-
12 mit a partial response by 4:30 this afternoon to
13 include the transcript of yesterday's proceeding.

14 THE COURT: I asked the Government to submit
15 the transcript with the papers.

16 MR. BERGMAN: Be that as it may, there will
17 be submitted a full response by the Government by
18 tomorrow afternoon. But I know of no order by the
19 Court at this point. The motion is still pending.

20 THE COURT: Who is on the panel?

21 MR. BERGMAN: There is no panel as far as I know.
22 There is only one judge sitting in the court these
23 days. The court is in recess -- that is the Court
24 of Appeals. I believe that Judge Mansfield will be
25 entertaining any applications. That's where the

A 216

1 matter stands right now. I advised the clerk to anti-
2 cipate a partial response by 4:30 this afternoon and
3 a fuller response by one o'clock.
4

5 As far as I know, no action has been taken,
6 pending our response, I suppose.

7 THE COURT: We will take a short recess.

8 (A recess was taken at this time.)
9

10 (Continued on next page.)
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A 217 388

214

1 THE COURT: Is Mr. Bergman here?

2 Mr. Condo and Mr. Yanagita, come forward.

3 I called Judge Mansfield and Judge Mansfield
4 is a Circuit Judge who is passing on this.
5 Unfortunately he wasn't available. I told the
6 Clerk that I was ready to send you to jail but I
7 wanted to make certain in the press of business
8 Judge Mansfield was aware there was a motion
9 to stay my order, and it just so happens, as I
10 previously indicated that both the Circuit Judges
11 in our court are involved in the plan for prompt
12 disposition of speedy trials and he was just over-
13 whelmed. But the one thing that the Clerk indicated,
14 his law clerk indicated, was that he was aware that
15 my stay expired at 2:00 o'clock. But I advised the
16 Clerk to advise Judge Mansfield I will extend my
17 stay until 11:00 o'clock tomorrow morning to make
18 certain that he has had a close look at the issues
19 and then at 11:00 o'clock if he hadn't extended
20 the stay then be prepared to go to jail.

21 Do you understand? Don't oversleep tomorrow.
22 You better give us your address and telephone
23 number.

24 MR. CONDO: I don't have a telephone number.
25 I don't know the address offhand.

2

THE COURT: How do you get home?

MR. CONDO: I know the building. 142nd Street
and Broadway.

THE COURT: In New York?

MR. CONDO: Yes, Manhattan.

THE COURT: Who do you live with? What is the
name of the party in the building?

MR. CONDO: Tien Lau.

THE COURT: Which side of the street is it
on? Do you know north and south and east and west?

MR. CONDO: Northeast corner.

THE COURT: On the corner? Northeast corner?

MR. CONDO: Yes.

THE COURT: I expect you here at 10:00 o'clock
tomorrow morning.

You are directed to be here.

And you too, Mr. Yanagita. Unless there is
a further order from the Court of Appeals, be prepared
to surrender to the Marshal.

MR. CONDO: How long is the sentence for?

THE COURT: For one month unless the trial is
over sooner and then it is until the verdict. That
is all this contempt is for. I don't know whether
any further proceeding will be taken by the Government.
I will leave that to the Government. That would be

1 3 something else.

2 MR. LEVIN-EPSTEIN: As to the Court's last
3 remark, I have conferred with Mr. Pattison and
4 it's being discussed right now and contemplated
5 right now that upon the expiration of the court
6 sentence or upon the reaching of a verdict in this
7 matter on trial, whichever is first, the Government
8 is considering seeking to find that information
9 against Mr. Yanagita and Mr. Condo citing them with
10 criminal contempt and charging them formally under
11 the section of law appropriate.

12 THE COURT: That is a possibility. As far as
13 any sentence here is concerned, there will probably
14 be a short sentence. But, I want you to know that that
15 might not be all.

16 I want that clearly understood so there is no
17 complaint later.

18 You always have a chance to purge yourselves
19 at anytime up until the time the jury renders its
20 verdict because up until then your testimony can be
21 given.

22 I don't want to say anymore since you don't
23 have your lawyer here. I just want you to know I am
24 extending your stay until 11:00 o'clock tomorrow.
25 I regard sending anybody to jail as a very serious

4 matter even for a day or a minute.

I don't want to do it unless I have one other judge look at it, because there are some interesting questions of law.

If Judge Mansfield does not extend the stay by 11:00 o'clock tomorrow morning then you've got to be prepared. Until that time, if you come in tomorrow and say, I am ready to testify, the contempt will be vacated.

MR. CONDO: You want us to remain here for the duration of the day?

THE COURT: No. Make sure you come back at 10:00 o'clock tomorrow.

MR. CONDO: Okay.

MR. YANAGITA: Okay.

MR. LEVIN-EPSTEIN: The Government is ready to go forward, your Honor.

THE COURT: I might say, because of what Mr. Bergman said, Mr. Bergman indicated maybe Judge Mansfield wasn't aware that the proceeding took place yesterday -- but the Clerk indicated that because of the rush there was some confusion and they couldn't grasp immediately. They understood that the contempt was determined yesterday and he thought that Judge Mansfield was aware

1 5

that the order, my stay, would expire 2:00 o'clock.

2

3

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5

MR. PATTISON: Mr. Schall is working on the case also. Between the two of them, I am sure they will be able to get in touch with the Clerk over there.

6

7

8

THE COURT: I think you ought to make sure that Judge Mansfield has a transcript of the proceeding yesterday.

9

10

MR. PATTISON: That will be over there by 10:00 o'clock today.

11

12

THE COURT: Fine.

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MR. PATTISON: We have messengers going over with them.

15

THE COURT: Fine.

.. (Continued on next page)

IG file.

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June 23, 1976

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1 A 222 (The following occurred in the absence of the
2 jury.)

3 MR. LIEBOWITZ: May we have use of the witness
4 room at this time?

5 THE COURT: Surely. Isn't it open?

6 MR. LIEBOWITZ: I'm not sure.

7 THE COURT: All witnesses in the case on trial
8 please retire to the witness room.

9 MR. LEVIN-EPSTEIN: The Government has one more
10 witness to call.

11 THE COURT: I'd like to talk about the statement.

12 MR. LEVIN-EPSTEIN: Very well.

13 MS. PIEL: I didn't hear you.

14 THE COURT: The statement -- Yanagita's state-
15 ment. I have come to the conclusion that the consti-
16 tutional right against the right of confrontation is
17 violated and it violates Bruton.

18 I have done all the reading that is available.

19 I tried desperately to bring it in against the
20 defendant Young because I recognized that the Govern-
21 ment has no right of appeal on these evidentiary
22 matters and where there is a real question I favor
23 introducing it.

24 I think there is little question that it is not
25 admissible.

1 The annotations refer to the problem of Bruton.
2 Judge Weinstein's treatise refers to it. He was ter-
3 ribly disturbed by it and I might say, for your edifi-
4 cation, Mr. Levin-Epstein, that I'm not bound by Judge
5 Weinstein's opinion, he was deeply involved in the form-
6 ulation of the rule and originally the rule itself had
7 the Bruton problem incorporated in it and the Congress
8 eliminated it and the suspicion is that what the
9 Congress was trying to do, if at all possible, by the
10 decision from the draft, was to overrule Bruton and
11 somehow, compromise the confrontation clause and I don't
12 think it's going to work.

13 MR. LEVIN-EPSTEIN: The Government has recognized
14 that there is an issue. It wasn't a closed question as
15 to the right of confrontation.

16 Of course, the matter is discretionary --

17 THE COURT: It's discretionary that I find all
18 the elements present.

19 MR. LEVIN-EPSTEIN: I'm talking about the evalu-
20 ation as to the right of confrontation.

21 THE COURT: I have the right or authority to
22 predict what the law will be and based on what that is
23 -- if that's what you mean by evaluation -- I make my
24 determination.

25 I find all the elements that make for reliability

A 224
present here.

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2 There is no question in my mind that Mr. Yana-
3 gita gave as little as he could in that statement,
4 enough to incriminate himself in my opinion. The
5 statement in my opinion is reliable.

6 The probative value far outweighs any risk of
7 jeopardy or prejudice, rather, to the defendant, and
8 with all that I find that it violates the constitutional
9 right of confrontation.

10 MR. LEVIN-EPSTEIN: I'm sure you considered
11 this in light of your remark -- Of course, the right
12 to confrontation, so-called, and the Sixth Amendment
13 right to confront one's accuser and cross-examine
14 them is not available in classic hearsay situations
15 as the Court pointed out yesterday.

16 The Government would argue, of course, and has
17 that this situation is different in no way from any
18 other hearsay situation.

19 Of course, had we had someone who had given a
20 dying declaration, as Mr. Liebowitz pointed out, he
21 clearly couldn't have examined the declarant in a
22 hearsay situation of that sort and yet there would be
23 no claim of Sixth Amendment lack of right to confron-
24 tation.

25 THE COURT: That is firmly incorporated in our

1 law of evidence.

A 225 222

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2 You can take a more routine hearsay document as
3 made in the regular course of business --

4 MR. LEVIN-EPSTEIN: We'll accept that analogy.
5 It's the same thing.

6 THE COURT: I say, as to hearsay. That's already
7 overcome as to constitutional challenge.

8 In my humble opinion these statements may directly
9 accuse the defendant of the crime charged and will not
10 subject the witness to cross-examination.

11 I thought you were going to make a more interest-
12 ing argument --

13 MR. LEVIN-EPSTEIN: Which one is that?

14 THE COURT: I'll make it for you and then deny
15 it because I have considered it.

16 That is, that this testimony or this statement
17 was incorporated as part of the record and that the
18 defendant Young waived the right to cross-examine by
19 entering into the stipulation. I said that yesterday.

20 MR. LEVIN-EPSTEIN: In anticipation of your
21 announced denial, I will not push that argument too
22 strongly.

23 THE COURT: I believe there is a good case to be
24 made for it, and if that was all that was involved I
25 would do it because that's fairly arguable on the cons-

1
2 The trouble is, there is an aiding and abetting
3 charge here.

4 MR. LEVIN-EPSTEIN: You have anticipated my
5 remarks.

6 THE COURT: And there, the defendant Chin did
7 not have a constitutional right.

8 So, I think that's it.

9 With Mr. Yanagita in court -- my ruling, I think
10 since he is here and still has the right to purge him-
11 self, I might say that makes his contempt so much more
12 severe and he should realize that as he can take his
13 own risk as he sees it.

14 MR. LEVIN-EPSTEIN In light of that would the
15 Court consider modifying its sentence as to Mr. Yana-
16 gita's contempt?

17 THE COURT: No, if the United States Attorney
18 files an information and if he is convicted of criminal
19 contempt his failure and refusal in the light of this
20 ruling will be taken into consideration in that sense.

21 MR. LEVIN-EPSTEIN: I represent to the Court
22 clearly and to Mr. Yanagita that the Government has
23 every intention, upon the earliest opportunity, to file
24 criminal contempt charges.

25 THE COURT: That is only the percive force of

1 the contempt and just the full realization of what his
2 action means and from there on he can take it.

3 Now, do you want to say something further? I
4 won't change my mind but say it for the record.

5 MR. LEVIN-EPSTEIN: I would argue the possibility
6 of the Court's considering 803 (b) (5) as a basis for
7 the use of the statement in that although the Court
8 indicated yesterday that on a formal basis Counsel for
9 the opposition had not been given notice of the inten-
10 tion to use the statement it might well be argued --

11 THE COURT: Same ruling, same problem.

12 MR. LEVIN-EPSTEIN: I am merely pointing out to
13 the Court various alternatives.

14 THE COURT: No, I think the place it could have
15 come in was 804 (b) (3) if at all or possibly, prior
16 testimony, 804 (b) (2), I think it was.

17 Are we ready now?

18 MR. LEVIN-EPSTEIN: The Government is ready to
19 proceed with another witness.

20 In light of the Court's ruling --

21 THE COURT: The exhibit is stricken.

22 MR. LEVIN-EPSTEIN: It's marked in evidence.

23 THE COURT: I'll strike it but it always remains
24 for identification.

25 MR. LEVIN-EPSTEIN: 27 for identification.

(continued next page)

June 23, 1976

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1 MR. LEVIN-EPSTEIN: That was July 29.

2 A 228 THE COURT: 3 and 4?

3 MR. LEVIN-EPSTEIN: That was the weapon
4 purchased by Mr. Condo on August 12, I believe it is.

5 THE COURT: And where did Condo purchase it?

6 MR. LEVIN-EPSTEIN: Cole's sporting goods.

7 THE COURT: Oh, I see.

8 Count 5 and 6?

9 MR. LEVIN-EPSTEIN: Count 5 and 6 relate to
10 the AR-7 purchased from Mr. Yanagita in mid-August
11 of 1975.

12 THE COURT: And Counts 7 and 8?

13 MR. LEVIN-EPSTEIN: Counts 7 and 8 relate to
14 the M-1 purchased from Mr. Yanagita in August of
15 1975 -- July or August -- I'm not sure of the date,
16 your Honor. I can be more specific if the Court
17 wishes.

18 THE COURT: Go ahead, Mr. Leibowitz.

19 MR. LEIBOWITZ: Addressing myself to -- I will
20 take the counts in order, your Honor.

21 Count 1 --

22 THE COURT: Incidentally, before you make your
23 motions, I notice Mr. Condo, again, is not present.

24 MR. LEVIN-EPSTEIN: That's correct, your
25 Honor.

1 THE COURT: He is probably a late riser,
2 isn't he?

3 MR. LEVIN-EPSTEIN: I wouldn't venture a guess.

4 THE COURT: Go ahead.

5 MR. LEIBOWITZ: Count 1, the AR-180 allegedly
6 purchased at Cole's Sporting Goods on the 29th of
7 July, there is no evidence that Kenneth Chin was
8 present.

9 In fact, I believe the witness from Cole's
10 Sporting Goods stated that he believed Mr. Chin was
11 not present. There is no other connecting evidence
12 with Mr. Chin and that is for the purpose of Count 2
13 wherein he is charged with receiving that weapon.

14 Likewise, under Count 3, there is no evidence
15 whatsoever that Mr. Chin was in California any more
16 on August 12 than he was on July 29 --

17 THE COURT: You don't think that possession
18 of the gun itself or some possession you may
19 reasonably infer that he helped procure its
20 possession --

21 MR. LEIBOWITZ: Not at all.

22 THE COURT: Well, I think that's enough.

23 MR. LEIBOWITZ: If that were enough, your
24 Honor, then any member of a household would be guilty
25 under that concept of law and I think the law is

seen any copy of any transcript. May I have it?

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THE COURT: I have photocopies in my chambers.

Let the record show that both transcripts are being turned over to Ms. Piel. If you lose them or alter them in any way, you have to pay for another copy and it goes at about two and a half dollars a page, as I recall it.

MS. PIEL: I will do my very best to take care of it, your Honor, and thank you.

(Pause)

THE COURT: Michael Yanagita?

(Michael Yanagita approached the bench.)

THE COURT: The Marshals are directed to take Mr. Yanagita into custody pursuant to the order of this Court dated yesterday.

I don't have a copy of the order.

Do you, Mr. Levin-Epstein?

MR. LEVIN-EPSTEIN: I will check.

May the record reflect that the time is 11:40.

THE COURT: Yes, and Mr. Kondo has not yet arrived.

Mr. Schall got the originals to take over to the Court of Appeals.

MR. LEVIN-EPSTEIN: I believe that Mr. Schall got more than that. I will get the papers and

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produce them for the Marshals.

THE COURT: When can you get this man to MCC?

THE MARSHAL: It could be in half an hour.

(Continued on next page.)

THE COURT: I am not asking that it be done
ly.

The problem is that we have another contemnor, Mr. Kondo, who has not shown up today which amounts to a second contempt -- really, a third.

MR. LEVIN-EPSTEIN: I would ask that a bench warrant issue for Mr. Kondo.

THE COURT: Yes. The problem is finding the house which is supposed to be located on the northwest corner --

MR. LEVIN-EPSTEIN: The Government always has that problem with a fugitive.

MS. PIEL: May I have that volume one? I have volume two of the transcript.

.. THE COURT: Yes.

THE CLERK: Yes, Ms. Piel. I'll bring it in.

(Court adjourned to June 24, 1976.)

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I N D E X

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<u>Witness:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
PHILIP D. WALLS	440	450		459
JULIUS COHEN	462	477		

E X H I B I T S

<u>Government's Exhibit</u>		<u>For Id.</u>	<u>In Ev.</u>
33	Document	420	422
34	Document	420	422

Court's Exhibit

1	Document	480	480
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Defendants' Exhibit

I	Payroll records	466	467
J	Five-page document		468

* * * *

June 24, 1976

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(Afternoon Session)

(The following occurred in the absence of the jury.)

MR. LEVIN-EPSTEIN: If I might interrupt the court's consideration as to requests to charge for a moment -- I know you indicated yesterday you wanted the matter taken care of expeditiously -- I am speaking of the criminal informations as to the two witnesses granted immunity.

I am handing up to the court a proposed information to be filed, signed by David G. Trager, in which Mark Choyel Condo is named in a charge violating 18 USC Section 401 (3) for criminal contempt.

I ask that information be ordered and filed and assigned to this court as a related case.

THE COURT: Do you have the other one too?

MR. LEVIN-EPSTEIN: Yes.

THE COURT: All right.

MR. LEVIN-EPSTEIN: Also, Your Honor, may the record reflect that I am handing up to the court a proposed information in the name of U.S. against Michael Kszuo Yanagita alleging the same violation.

THE COURT: Let them both be filed.

I think they should be advised and writted in some time tomorrow to plead.

1 MR. LEVIN-EPSTEIN: I hand to the court an
2 original and three copies of a proposed order to show
3 cause as well as a supporting affidavit signed by my-
4 self on behalf of the United States attorney indicating
5 a description of the charges contained in the related
6 information; a time and place for initial hearing on
7 the matter and application that notice be given to
8 both Michael Yanagita and Mark Kondo.

9 I hand that up to the court now.

10 THE COURT: How much time must you give him?

11 MR. LEVIN-EPSTEIN: It merely says a reasonable
12 amount of time to prepare a defense.

13 In light of the circumstances of the case and
14 the court's and counsel's familiarity and the fact
15 that one lawyer represents both, it is the opinion of
16 the Government that the amount of time laid out and
17 suggested is a reasonable amount of time.

18 The court will note that the matter is suggested
19 to be set down for July 1st, 9:30 in the morning or as
20 soon thereafter as counsel may be heard.

21 If the court please, I will ask the court to
22 direct a deputy marshal of our Eastern District
23 Marshal Service to cause these papers to be served
24 in the appropriate manner at the Metropolitan Correc-
25 tional Facility.

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1 THE COURT: I assume they have to come in for
2 pleadings.

3 MR. LEVIN-EPSTEIN: Under Rule 42 of the Federal
4 Rules of Criminal Procedure there are two ways in
5 which a defendant may be notified of the outstanding
6 charges against him; one, by order of arrest and the
7 other, by way of order to show cause.

8 Inasmuch as both defendants are in custody pur-
9 suant to this court's prior determination that they were
10 in civil contempt, the Government sees no reason to
11 order their arrest. They are already in custody.

12 So, we elected to pursue it by way of order to
13 show cause.

14 THE COURT: I have little faith in Mr. Kondo.
15 Do you know where he lives in California?

16 MR. LEVIN-EPSTEIN: I have an address Your Honor
17 for him.

18 In light of the --

19 THE COURT: Before he is discharged in this
20 matter I want him brought here to make sure that we
21 have his California address and know just where to get
22 him so if he doesn't show we can come get him.

23 MR. LEVIN-EPSTEIN: This is going to be served,
24 I am informed by our Marshal Service, by the Court's
25 direction.

1 Deputy United States Marshal oh, yes.

2 THE COURT: Will you call Mr. Reif to tell him
3 it's returnable so there is no question about it.

4 MR. LEVIN-EPSTEIN: I will.

5 If the court so directs, should this trial end
6 prior to July 1st, at 9:30 in the forenoon, this Court
7 can direct that either or both defendants be brought
8 before this court for the purpose of application for
9 bail and the Government will then make recommendations
10 as to bail pending this hearing and the criminal con-
11 tempt charges.

12 THE COURT: I certainly don't want them dis-
13 charged.

14 Yes, I would like to fix bail in this case. Mr.
15 Kondo hasn't shown himself to be the most reliable
16 defendant who has appeared before me.

17 MR. LEVIN-EPSTEIN: To that end would it be
18 the Court's desire for the Government to request they
19 be produced in court on the day of the verdict or as
20 soon thereafter as possible?

21 THE COURT: I think they should be produced to-
22 morrow some time in the afternoon. I will be free in
23 the afternoon to deal with it and I would ask you to
24 tell Mr. Reif.

25 MR. LEVIN-EPSTEIN: I will.

1 THE COURT: I suggest they be brought in at
2 2 o'clock and tell Mr. Reif to be here.

3 MR. LEVIN-EPSTEIN: Very well, Your Honor.

4 THE COURT: In reading Jones I notice a pertinent
5 observation by Judge Feinberg that apparently is some-
6 thing like the claim that Ms. Piel makes:

7 Similarly, the claim that this section did not,
8 and could not, apply to Appellant because he had always
9 been a law-abiding citizen is close to frivolous. It
10 is true that the Omnibus Crime Control and Safe
11 Streets Act of 1968, of which Section 922(a)(3) is a
12 part, contains a Congressional declaration of purpose
13 not to place undue Federal restrictions on law-abiding
14 citizens with respect to various lawful uses of fire
15 arms -- and the statute is cited again -- however, the
16 Act carries out that legislative purpose principally
17 by permitting intra-state sale of fire arms subject
18 only to certain limited exceptions for specified
19 categories of buyers and weapons, and by permitting
20 interstate shipment of fire arms between licensed
21 dealers, importers and manufacturers.

22 The decision does discuss residence, yes.
23 It just notes there were no objections to the charge.

24 Here, in this case, there are objections to
25 every word of the charge including the commas so though

June 25, 1976

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5 1 I think that you looked at the evidence very
2 carefully and from what I see of your verdict you just
3 felt that the Government didn't prove its case as to
4 some of the counts and rightfully, you found the
5 defendants not guilty.

6 I can now tell you more than I could before
7 concerning the witnesses Yanagita and Kondo.

8 Yanagita and Kondo were both subpoenaed by the
9 Government. They refused to testify and that accounted
10 for some of the recesses we took.

11 I held them in contempt of Court. They went to
12 jail in the hope that jail might give them a taste of
13 the pressures and that they would come into Court and
14 testify. They still refused to do that so they were
15 charged with criminal contempt and the reason you were
16 delayed here was because their lawyer was up in
17 Judge Dooling's Courtroom -- the case was assigned to
18 Judge Dooling out of the wheel -- and they were trying
19 to fix a date for their trial for refusing to testify.

20 Now, you just heard the evidence that was sifted
21 through and that the Government was allowed to
22 introduce. That's the way it should be. You decided
23 the case on what was before you.

24 It may have been that if Yanagita and Kondo came
25 into Court to testify that you may have found enough

UNITED STATES,

Plaintiff,

-against-

MICHAEL KAZUO

YANAGITA,

Defendant.

76 CR 420

UNITED STATES,

Plaintiff,

-against-

MARC CHOYEI

KONDO,

Defendant.

76 CR 421

DEFENDANTS' MEMORANDUM OF LAWINTRODUCTORY STATEMENT

Defendants are each charged by information with failure to obey an order of the Court to testify at a trial held in this District in June, 1976, in violation of 18 U.S.C. Section 401 (3). This memorandum is submitted in support of defendants' motion to dismiss the informations filed herewith and various motions for judgments of acquittal which will be based upon facts to be adduced at trial.* These cases and motions arise from the following circumstances:

*It is inappropriate to file these latter motions now, as they do not challenge the sufficiency of the informations but are in the nature of defenses to the charge of wilful disobedience to the "lawful" order of the Court to testify, to wit, that said orders were not lawful. See U.S. v. Snyder, 428 F. 2d 520, 522 (9 Cir. 1970), cert. den. 400 U.S. 903. Said motions will thus be made after the facts upon which they are based (cont. next page)

In November, 1975, Kenneth Chin and Elizabeth Jane Young were charged in an indictment filed in this District with interstate transportation and receipt of various firearms in violation of 18 U.S.C. Sections 922 (a) 3 and 2 and with conspiracy to commit the substantive offense in violation of 18 U.S.C. Section 371. (A copy of the indictment is annexed hereto as Exhibit A.) In April, 1976, Young, then (and hereafter) known as Elizabeth Jane Young Chin, was tried alone before a jury. Michael Yanagita was subpoenaed from Los Angeles, California to be a prosecution witness at the trial. When called to testify, Yanagita invoked his privilege against self-incrimination and was subsequently ordered to testify pursuant to 18 U.S.C. Sections 6002-3. Thereafter, however, an agreement was reached between the prosecution and counsel for Chin which resulted in Yanagita being excused as a witness. Marc Kondo, the second defendant herein, was not subpoenaed to appear as a witness at this trial.

The jury acquitted Chin of the charge of conspiracy and was unable to agree upon a verdict on the substantive charge. Immediately thereafter the government obtained a superseding indictment, charging each of the Chins with transportation and receipt of the same firearms but separating the firearms into separate counts. (See superseding indictment annexed hereto as Exhibit B.)

are introduced into evidence. At the same time we recognize these motions raise issues of sufficient complexity to warrant more consideration by the Court than might be possible if the legal arguments were presented for the first time at trial. Accordingly, we have included herein a discussion of legal issues which will be raised by the motions for judgments of acquittal, reserving our right to make such motions at trial.

Both Yanagita and Kondo were subpoenaed and appeared as prosecution witnesses at the joint trial of the Chins on the superseding indictment in June, 1976. Both were ordered to testify pursuant to 18 U.S.C. Sections 6002-3. Each nevertheless declined to testify on the basis of the Fifth Amendment privilege against self-incrimination, as well as other grounds discussed infra. Each was thereupon adjudged in contempt on June 22, 1976, and ordered incarcerated "for a period not to exceed one (1) month from this date, or until such time as the trial of the [Chin] matter, now in progress, shall reach a verdict."

Yanagita and Kondo were released on June 25 when the jury returned a verdict finding each of the Chins guilty on some counts and not guilty on others. They were arraigned the same day upon the informations herein.

I. DEFENDANTS' PROSECUTION UNDER THE INFORMATION HEREIN ARE BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

Defendants respectfully submit the orders entered by Judge Mishler on June 22, 1976 holding them in contempt for their respective refusals to testify at the trial of U.S. v. Kenneth Chin and Elizabeth Jane Young Chin, 75 CR 851 (s) were adjudications of criminal contempt and, accordingly, prosecution of the informations herein, which informations are based upon the same refusals to testify as formed the bases for the orders entered by Judge Mishler, is barred by the Double Jeopardy Clause of the Fifth Amendment.

That clause states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The purpose of this provision was reviewed by the Supreme Court in Green v. U.S., 355 U.S. 184, 187-188 (1957):

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:

'...the plea of autrefois acquit, or a former acquittal is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.'

Substantially the same view was taken by this Court in Ex parte Lange, 18 Wall. 163 at 169:

'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (footnotes omitted)

See also U.S. v. Wilson, 420 U.S. 332, 339-343 (1975).

The prohibition against double jeopardy has been found so fundamental to our system of jurisprudence as to be applicable to state prosecutions by virtue of the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). This constitutional safeguard bars a

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prosecution founded upon the same factual allegations as formed the basis for a previous prosecution and criminal judgment against the same person in the same jurisdiction, e.g., Waller v. Florida, 397 U.S. 387 (1970), including a second prosecution for the crime of contempt. See, e.g., People v. Colombo, 31 NY 2d 947, 341 NYS 2d 97, 293 N.E. 2d 247 (1972); People v. Menna, 38 NY 2d 850, 382 NYS 2d 56, 345 N.E. 2d 599 (1976); People v. Lombardo, 50 C.A. 3d 849, 123 Cal. Rptr. 755 (1975); see also Colombo v. New York, 405 U.S. 9 (1972); Menna v. New York, ___ U.S. ___, 96 S. Ct. 241 (1975). Thus, if defendants have already been subjected to federal criminal judgments founded upon the same facts as are alleged herein, the instant prosecutions are barred by the Double Jeopardy Clause.

The gravamen of the charge against Yanagita and Kondo is that each unlawfully declined to testify at the trial of the Chin case after being ordered to do so by the trial judge. The information against Yanagita charges as follows:

"On or about the 22nd day of June, 1976, within the Eastern District of New York, the defendant MICHAEL KAZUO YANAGITA, being then a witness before the United States District Court for the Eastern District of New York, having received a lawful order of that Court, in open court, to wit: to answer questions asked of him, under a grant of immunity, during the conduct of the trial of United States of America v. Kenneth Raymond Chin and Elizabeth Jane Young, now known as "Elizabeth Jane Young Chin", Docket No. 75 CR 851 (s), did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer any questions asked of him during the aforementioned trial. (Title 18, United States Code, Section 401 (3))."

The information against defendant Kondo is identical. It is plain defendants' respective refusals to testify are the exact acts as formed the bases for the judgments entered against them by Judge Mishler. (See Exhibits C and D). The sole remaining issue, therefore, is whether or not the judgments previously entered were criminal judgments.

The order in Yanagita's case reads as follows:

"[I]t is therefore ORDERED, that MICHAEL K. YANAGITA, be immediately remanded to the Custody of the Attorney General of the United States and/or to the United States Marshal for the Eastern District of New York, or any of their duly authorized representatives to be incarcerated at the place of their proper selection, for a period not to exceed one (1) month from this date, or until such time as the trial of the above-captioned matter, now in progress, shall reach a verdict.

SO ORDERED." (Emphasis added)

The order is predicated in part upon an earlier finding that

"YANAGITA has been advised by the Court...that [his] refusal to answer [questions at the Chin trial] will result in a citation for contempt of Court and incarceration for the duration of this trial or six (6) months, whichever is less..."

The written judgment is identical to Judge Mishler's oral statement of it.* The decree in Kondo's case tracks that in Yanagita's verbatim.**

It is to be noted that neither decree includes a purge clause, that is, a clause to the effect that if the defendant does a specified act, to wit, testifies, the judgment against him will be vacated and the

*"THE COURT: I find the defendant in contempt of Court and I direct he be committed to the Metropolitan Correctional Institution for a period of one month or to the time of verdict in this case on trial, whichever event is first." (T. 177, June 22, 1976)

** See Exhibit D annexed hereto.

defendant released from incarceration. It is submitted a civil contempt judgment must necessarily include a purge clause, a criminal contempt judgment is distinguished from a civil judgment by the omission of such a purge clause and, accordingly, the decrees entered by Judge Mishler against the defendants were in the nature of criminal judgments.

The foregoing is confirmed by examination of the decisions of the U.S. Supreme Court and other courts which have clarified the difference between civil and criminal contempts. In Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911), the Court spoke at length as to the distinction:

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' Bessette v. W.B. Conkey Co. 194 U.S. 329, 48 L. ed. 1002, 24 Sup.Ct.Rep. 665... It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance he could be committed until he complied with the order. Unless

there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in Re Nevitt, 54 C. C. A. 622, 117 Fed. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

* * *

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character or vice versa.

* * *

The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

221 U.S. at 441, 442, 443 (emphasis added).

The Gompers Court thus identified as the key factor distinguishing criminal and civil contempt whether or not the decree provides that the contemner "stand committed unless and until he performs the affirmative act required by the court's order." The question is whether or not the judgment places in the hands of the contemnor the power to obtain his release. If, according to the court's order, there is something he can

do which will result in his release, i.e., the order contains a purge clause, then the contempt is deemed civil. If, on the other hand, the order does not condition release upon an act within the control of the contemnor, then "the defendant is furnished no key," Gompers, supra at 442, and the contempt is deemed criminal.

In Shillitani v. U.S., 384 U.S. 364 (1966), the Supreme Court reaffirmed the distinction drawn in Gompers. The test in determining whether a contempt is criminal or civil is whether the judgment provides a contemnor may obtain his release by his performance of an affirmative act. When he can, "the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" 384 U.S. at 368 (citation omitted). On the other hand, criminal contempt is "characterized by the imposition of an unconditional sentence," 384 U.S. 370, n. 5, i.e., a sentence not conditioned upon the performance of an affirmative act by the contemnor.

In Colombo v. New York, 405 U.S. 9 (1972), a grand jury witness was summarily adjudged in contempt for refusing to obey an order to testify before a grand jury. He was sentenced to thirty days and fined \$250. After serving his sentence and paying his fine he was indicted for contempt in connection with his refusal to testify before the grand jury. The trial court dismissed the indictment on double jeopardy grounds but the Appellate Division reversed. The New York Court of Appeals affirmed the reinstatement of the indictment, holding that the

initial contempt was civil in nature and further that the indictment was not based upon the same act for which Colombo had earlier been held in contempt. People v. Colombo, 29 NY 2d 1, 4, 323 NYS 2d 161, 163-164 (1971).

The U.S. Supreme Court vacated the judgment of the Court of Appeals based upon its disagreement with that court as to the nature of the contempt. It found Colombo had not, contrary to the New York court's assertion, held "the key to his freedom," 323 NYS 2d at 164, that the initial decree ordered his commitment for a definite term and fine, i.e., did not include a purge clause. It therefore held the first judgment was a criminal contempt for purposes of the Double Jeopardy Clause.* Thus the Court disregarded the lower court's characterization of the initial contempt as civil and determined whether or not the contemnor had "carried the keys to his own freedom." Finding he had not, the Court held the initial contempt judgment was criminal in nature.

Decisions of other courts likewise support the conclusion that whether or not a purge clause is included in a contempt judgment is decisive for purposes of determining whether that judgment is criminal or civil.

In U.S. v. DiMauro, 441 F. 2d 428 (8 Cir. 1971), the appellants were subpoenaed before a federal grand jury and, after invoking the

*On remand the New York Court of Appeals held the two contempts were based upon the same facts and that the Double Jeopardy Clause therefore barred prosecution of the second contempt. People v. Colombo, 31 NY 2d 947, 341 NYS 2d 97 (1972)

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privilege of self-incrimination, were to testify after being granted transactional immunity pursuant to 18 U.S.C. Section 2514. When they refused, each was adjudged in contempt and sentenced to three years imprisonment.

On appeal, the witnesses argued the contempt judgments were civil and that the life of the grand jury having expired, their unconditional release was required. The rejection of this contention was based in part upon the Court of Appeals determination that the sentences "contained no purge clause". 441 F. 2d at 432. This, said the Court, "marks the conviction as being for criminal contempt." Id.*

In Southern Railway Co. v. Lanham, 403 F. 2d 119 (5 Cir. 1968), the Court of Appeals was called upon to determine whether a contempt judgment founded upon the refusal of defendant in a civil suit to comply with an order of the District Court to produce documents was civil or criminal. After setting forth the applicable law, see 403 F. 2d at 124-125 and authorities cited, the unanimous Court concluded:

"On the basis of these well-established principles, we conclude that the order before us is criminal. The order imposes an unconditional fine payable to the court for appellant's 'wilful and wanton disregard for this Court's order of production.' 'It awards no relief to a private suitor.' It does not permit appellant to purge itself and remove the sanction by compliance with the court's

*It is interesting to note the Court adhered to this conclusion even after its acknowledgment that, at the time of entry of judgment and sentence, the District Court had stated orally that if the witnesses testified it would consider that in a motion to reduce sentence and that, subsequently, it had reduced the sentence to probation upon each of the witnesses doing this act previously ordered by the Court. Id.

discovery order. The contemnor does not "carr[y] the keys of his prison in his own pocket," and therefore the fine 'operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.'" Supra at 125 (citations omitted).

Several other Courts have ruled in conformity with the above authorities. E.g., Carbon Fuel Co. v. United Mine Workers, 517 F. 2d 1348, 1349 (4 Cir. 1975); IBM v. U.S., 493 F. 2d 112, 115 (2 Cir. 1973), cert. den. 416 U.S. 995; Baker v. Eisenstadt, 456 F. 2d 382, 387, (1 Cir. 1972).

The decrees entered by Judge Mishler plainly do not include provisions to the effect that if the defendants testified they would be released from incarceration. Furthermore, the trial judge expressly found that each defendant had committed a "willful" disobedience of the order requiring him to testify,* a finding required for a criminal contempt judgment under 18 U.S.C. Section 401 (3).** Conversely, "wilfulness" is not an element of civil contempt for failure to testify at a federal trial, see 28 U.S.C. Section 1826, nor did the judge employ language which conforms to the civil contempt provision.*** Under the

*"THE COURT: I find that the witness Michael Yanagita is in contempt of court for willful refusal to answer questions properly posed by the Court." (T. 161)

"THE COURT: I find the defendant [Kondo] has willfully refused to obey the directions of the Court and he is in contempt of court." (T. 171)

**E.g., U.S. v. Polizzi, 323 F. Supp. 222 (C.D. Cal. 1971), rev'd on other grounds 450 F. 2d 880 (9 Cir. 1971).

***The standard for civil contempt set forth in Section 1826 is that the witness refuse "without just cause shown to comply with an order of the court to testify..." See Gelbard v. U.S., 408 U.S. 41 (1972).

foregoing circumstances, the judgments heretofore entered against defendants were criminal in nature, and their prosecution here on the same facts is barred by the guarantee against double jeopardy.

II. THE FIFTH AMENDMENT PROTECTED DEFENDANTS AGAINST HAVING TO GIVE TESTIMONY SELF-INCRIMINATING UNDER THE LAWS OF JAPAN WHERE THERE WAS A REALISTIC POSSIBILITY THAT THEIR TESTIMONY WOULD BE USED AGAINST THEM IN A JAPANESE PROSECUTION AND WHERE THE IMMUNITY GRANTED THEM DID AND COULD NOT PREVENT SUCH USE OF SELF-INCRIMINATING TESTIMONY.

It is submitted that Yanagita and Kondo's assertion of the Fifth Amendment after being granted immunity pursuant to 18 U.S.C. Sections 6002-3 was a proper assertion of the privilege against self-incrimination because (A) Yanagita and Kondo's answering the questions would have tended to incriminate each under the laws of Japan; (B) there was a realistic possibility this trial testimony could be used against each in a Japanese prosecution under such laws; and (C) the Fifth Amendment privilege against self-incrimination protected Yanagita and Kondo from having to testify in such circumstances.

A. Each Defendant's Answering The Questions Sought To Be Asked Of Him Would Have Tended To Incriminate Him Under The Laws Of Japan.

At the Chin trial, the Assistant U.S. Attorney sought to question both Yanagita and Kondo about guns which were the subject of the indictment therein. Counsel were informed by the AUSA that the government

would seek to prove through their testimony that each of them sold or gave to the defendants one or more such firearms.*

In Hoffman v. U.S., 341 U.S. 479, 486 (1951) the U.S. Supreme Court enunciated the test for whether the answers to questions asked of a witness will tend to incriminate that witness (and therefore the witness has the right to decline to testify):

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" (citation omitted).

If answers to the questions would "supply investigatory leads to a criminal prosecution," the privilege may be asserted. Albertson v. Securities Activities Control Board, 382 U.S. 70, 78 (1965). The question to which

*At the trial, the government introduced into evidence two "disposition notices" from the City of New York Firearms Control Board allegedly bearing Michael Yanagita's signature. These notices listed Yanagita as the seller of two guns, an AR-7, Serial No. 29474 and an M-1, Serial No. 5487136, to Kenneth Chin. Also introduced by the government was a "firearms transaction record" from the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms which listed Kondo as the purchaser of a AR-180 rifle, Serial No. 512590 from Coles^{Spouting Goods}, a gun store in California, on August 8, 1975. Each of these particular firearms was a subject of the indictment.

a claim of privilege is interposed must be considered in the setting in which it is asked and the court should focus its inquiry on what a truthful answer might disclose. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 479 (1972). A claim of privilege may be denied only after the scrutiny mandated above reveals it is:

"perfectly clear from a careful consideration of all circumstances in the case, that the witness is mistaken and the answers cannot possibly have such tendency to incriminate."

Hoffman v. U.S., supra at 488 (emphasis added, citations omitted). See also Malloy v. Hogan, 378 U.S. 1, 12 (1964). This test applies in determining whether there is a danger of incrimination under foreign law. In re Cardassi, 351 F.Supp. 1080, 1083-84 (D.Conn. 1972); see also Zicarelli, supra.

The government has consistently contended the Chins were planning to assassinate Emperor Hirohito of Japan during his visit to New York City in October, 1975; and that the weapons seized in their apartment (which are the subject of their indictment) were to be used for this purpose. On October 3, 1975 a search warrant was issued for the premises of the Chin apartment upon application of the Secret Service. This application was made pursuant to 18 U.S.C. Section 3056, which authorizes the Secret Service to "protect the person of a visiting head of a foreign state or foreign government." Two supporting affidavits were submitted by Neal Findley, Special Agent of the Secret Service. The "Supplemen-

tal Affidavit," was originally sealed by the court and only disclosed during subsequent court proceedings. Findley stated explicitly:

"This Supplemental Affidavit is submitted in connection with and in support of an application for a search warrant for the above-described premises. A search warrant is sought in connection with an investigation surrounding the official visit of Emperor Hirohito of Japan to the United States and, more particularly, to the City of New York which is currently scheduled to take place between the 4th day of October 1975 and the 7th day of October 1975."

He further stated:

"It is the opinion of the undersigned and of the United States Secret Service that the existence of the firearm described in your deponent's affidavit in support of this search warrant and the involvement of the above-mentioned individuals poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States. Accordingly, pursuant to Title 18 of the United States Code, Section 3056 and the authorization to protect the person of a visiting head of a foreign government as embodied therein, the foregoing information is provided..."

The warrant was executed on October 4, 1975 and the four guns which were the subject of the Chin indictment were seized. The Chins were arrested that same day by the Secret Service and arraigned on October 6, on charges of alleged violation of 18 U.S.C. Sections 922(a)(3) and (6) and 371. Bail was set for each in the unusually high figure of \$25,000.

In the many newspaper articles which appeared in the New York press after the Chins' arrest, both the Secret Service and the U.S. Attorney's Office reiterated the government's belief the weapons seized in the search were to be used to assassinate Emperor Hirohito. In an article in the Daily News on October 5, 1975, it is reported that Charles Whitaker, Special Agent in charge of the Secret Service's New York office, stated

the raid was the result of his agency's duties as the protection agency for the President and certain foreign leaders. In the same article, Raymond Dearle, an assistant U.S. Attorney, is quoted as saying that "the Secret Service was definitely of the opinion that there might be a connection between the visit of Emperor Hirohito and the purchase in California last July of an automatic weapon which they had information was in this apartment in Brooklyn." The article also stated the New York City police maintained the raid was the direct result of a tip about a plot to kill the Emperor.

On October 6, 1975, an article appeared in the New York Times concerning the Chins stating the Secret Service believed the weapons seized might have been intended for use in an assassination attempt on Emperor Hirohito. A New York Times article on October 7, 1975 reported that Charles Whittaker said his office searched the suspects' apartment because from the FBI it had received leads/regarding a possible threat by the two suspects to persons under the protection of the Secret Service.

Under Japanese law, an attempt to assassinate the Emperor would be evidence of a serious criminal offense. The Japanese Penal Code provides as follows:

"Article 77. A person who commits an insurrectionary or seditious act with the object of overthrowing the government, seizing the territory of the state, or otherwise subverting the national constitution shall be guilty of the crime of civil war and punished subject to the following distinctions:

(1) A ring leader shall be punished with death or imprisonment for life;

(2) A person who participates in a plot or holds a command

in the mob, with imprisonment for life or not less than three years; a person who engages in various other functions, with imprisonment for not less than one year nor more than ten years;

(3) A person who merely joins in the insurrectionary or seditious act, with imprisonment for not more than three years.

2. An attempt of the crime mentioned in the preceding paragraph shall be punished, except in the case of persons mentioned in item (3) of the preceding paragraph.

Article 78. A person who prepares or conspires civil war shall be punished with imprisonment for not less than one year nor more than ten years.'

Most importantly for present purposes, the Japanese Code further provides:

"Article 79. A person who aids and assists the commission of a crime under the preceding two Articles by furnishing arms, money or provisions, or by other acts, shall be punished with imprisonment for not more than seven years." (Emphasis added).

The Penal Code also provides that Japan has extraterritorial jurisdiction over crimes committed under this section by any person. Article 2 expressly states that Japanese criminal jurisdiction shall extend over

"every person who commits any of the following crimes outside the territory of Japan:

(2) Crimes specified in Article 77-79 inclusive" (Emphasis added).

Thus, an insurrectionary offense under Articles 77-79 committed on U.S. territory would be prosecutable in the Japanese Courts.*

*The extraterritorial effect of these laws distinguishes this case from others where the witness' assertion of the Fifth Amendment privilege against self-incrimination under the law of a foreign jurisdiction has not been upheld. See In re Cahalane, 361 F. Supp. 226, 227 (E.D. Pa. 1973); In re Quinn, 525 F. 2d 222, 223 (1 Cir. 1975). In neither of these cases could the defendant cite a foreign statute under which he might reasonably fear prosecution for acts committed within the United States. Both courts, in fact, noted the rarity of extraterritorial criminal jurisdiction. As described above, however, this rare circumstance is squarely presented here.

Although the scope of Article 77 is not explicated in the Penal Code, it is clear the assassination of the head of the Japanese government would constitute evidence of violation thereof and, similarly, the furnishing of arms for such purpose would be evidence of violation of Article 79. Under the Japanese Constitution, the Emperor has many roles, duties and responsibilities:

"ARTICLE 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

* * *

ARTICLE 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

2. The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.

ARTICLE 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

- (1) Promulgation of amendments of the constitution, laws, cabinet orders and treaties;
- (2) Convocation of the Diet;
- (3) Dissolution of the House of Representatives;
- (4) Proclamation of general election of members of the Diet;
- (5) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
- (6) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
- (7) Awarding of honors;
- (8) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
- (9) Receiving foreign ambassadors and ministers;
- (10) Performance of ceremonial functions."

By his title and duties as set forth in the Constitution, the Emperor embodies the authority of the state of Japan. An attack upon him, as representative of the State, is an attack upon the state and would,

undoubtedly, be evidence of an effort to create civil insurrection within the meaning of Article 77. Accordingly, furnishing arms for the commission of such an act would be evidence of violation of Article 79.

That the assassination of a head of state would be viewed as part part of an attempt to overthrow the government is a concept rooted in the law of the United States (and probably the laws of every country). The comparable U.S. statute, the Smith Act, 18 U.S.C. Sections 2383 et seq, explicitly defines insurrection to include the assassination of a government official:

§2385. ADVOCATING OVERTHROW OF GOVERNMENT

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government;

Shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. (Emphasis added)

When, in fact, an assassination attempt was made against U.S. government officials, the government successfully prosecuted the alleged assassins for seditious conspiracy under 18 U.S.C. Section 2384. See U.S. v. Lebron, 222 F. 2d 531 (2 Cir. 1955).

It is clear then, that in the setting in which the questions were asked the witnesses - that is, the trial of two individuals for the possession of guns which were, according to the government, to be used

to assassinate the Emperor of Japan and which, again according to the government, were furnished the trial defendants by Yanagita and Kondo, answering the questions would have posed a real danger of self-incrimination under Japanese law.

It is helpful to compare the instant case to Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), where the Supreme Court had noted probable jurisdiction specifically to consider whether the Fifth Amendment protects an individual from incrimination under the laws of a foreign jurisdiction. See 401 U.S. 933, 934 (1971).

In Zicarelli, the witness, subpoenaed to appear before a state commission investigating organized crime, claimed questions asked concerning the "geographical area of his Cosa Nostra responsibilities" would incriminate him under the laws of a foreign jurisdiction. He submitted various newspaper articles to support this claim which detailed his alleged participation in unlawful ventures growing out of alleged interests and activities in Canada and the Dominican Republic. While the Court found that "these newspaper articles would lend support to a claim of foreign prosecution in the abstract,"* it found they did "not support such a claim in the context of questions asked." 406 U.S. at 479. The Court pointed out that the geographical area referred to in the questions was

*It had earlier been established that newspaper articles were an appropriate means of demonstrating the setting in which the questions were being asked. Hoffman v. U.S., supra. See also In re Cardassi, supra.

New Jersey, and thus, in context, there was no real danger of self-incrimination in a foreign jurisdiction.

In the instant case, however, any answer to the questions, even if the answer only dealt with activities which transpired in the United States, would have incriminated the defendants under the laws of Japan. In the context of the trial, the same testimony of the defendants about the provision of guns to the Chins in the U.S., would have made out both an offense under U.S. law and have served as a link in the chain of evidence necessary to prosecute them under the law of Japan. Thus, the "peculiarities of the case" demonstrate Yanagita and Kondo had substantial reason to fear that answers they gave would serve as "a link in the chain of evidence needed to prosecute" them under the law of Japan.

B. There Was A Substantial Risk That Yanagita And Kondo's Testimony Could Be Used Against Them In Prosecutions Under The Laws Of Japan.

In this case, Yanagita and Kondo had a real and substantial fear any answers given would not only be self-incriminatory but could also be used in a prosecution of them under the law of Japan.

In In re Tierney, 465 F. 2d 806 (5 Cir. 1972, the court pointed out that the potential danger to a witness who feared prosecution under the laws of a foreign jurisdiction was twofold: the country could assert jurisdiction over the defendant if the defendant travelled to it, or the country might seek to extradite the defendant. Justice William O. Douglas, arguing that the Supreme Court should in fact examine this

question, stated:

"It is not enough to say that petitioners are not subject to a foreign jurisdiction: At any time petitioners could be traveling in a foreign country or find themselves the subjects of various international extradition treaties." Tierney v. U.S., 410 U.S. 914, 915-916 (1973) (dissenting from denial of cert.)

In this case, there is a substantial possibility either of these methods of acquiring jurisdiction might be exercised. The defendants have ties to Japan which might require them to in fact visit Japan. (For example, Yanagita was born in Japan and still has relatives in Japan there.)

Further, there is a substantial risk Japan will exercise its jurisdiction over them by way of extradition. An extradition treaty between the U.S. and Japan was concluded in 1886 and supplemented in 1906. Under it, each country agreed to deliver up certain persons, including its own citizens who were charged with certain offenses:

Article I.

The High Contracting Parties engage to deliver up to each other, under the circumstances and conditions stated in the present Treaty, all persons, who being accused or convicted of one of the crimes of offences named below in Article II, and committed within the jurisdiction of the one Party, shall be found within the jurisdiction of the other Party.

Article II.

1. Murder, and assault with intent to commit Murder.

Kondo and Yanagita could be extradited under Article II, Section 1, for murder. Extradition treaties are to be construed liberally. Valentine v. U.S., 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); In re Edmundson, 352 F. Supp. 22 (D. Minn. 1972). The Supreme Court has established certain rules of construction:

"In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements... [O]bligations should be deliberately construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." Factor v. Laubenheimer, supra at 293-4 (citations omitted).

Several courts have confronted the exact question which would be raised in this case with respect to extradition: which offenses fall under the common law terms often used to denote extraditable offenses in treaties. In Cohn v. Jones, 100 F. Supp. 639, 645 (S.D. Iowa, 1900), the court held:

"When an extradition treaty uses general names, such as 'murder', 'arson', and the like, in defining the classes of crimes for which persons may be extradited, the question of whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for."

See also: U.S. v. Guay, 11 F. Supp. 806 (N. Hamp. 1935), mod. 87 F. 2d 358, cert. den. 300 U.S. 678 (1936); U.S. v. Stockinger, 170 F. Supp. 506 (E.D.N.Y. 1959); Greene v. U.S., 154 F. 401 (5 Cir. 1907).

Accordingly, persons may be extradited for acts which fall within the generic categories specified by the extradition treaty, regardless of the specific title of the offense for which they are being extradited. Assassination of Emperor Hirohito would plainly fall within the generic term of "murder".*Thus a real possibility of extradition existed, thereby

*Moreover, the seriousness of the offense here involved increases the possibility of extradition. Articles 77-79 do not deal with technical offenses or ones with light penalties. Contrarily, they involve the most serious crimes a nation can fear and violation thereof is punishable with severe sentences. Overthrowing the government is undoubtedly a
(cont. on next page)

creating a realistic and substantial possibility of Japanese prosecution of Yanagita and Kondo.

Moreover, there was no guarantee, at the time Yanagita and Kondo were ordered to testify, that their testimony would not be used against them in a trial in Japan. The immunity United States courts could provide Yanagita and Kondo from direct or indirect use against each of his own trial testimony is necessarily limited to jurisdictions within the United States. See Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964). Courts simply lack the ability to control what evidence is admitted in prosecutions in foreign countries.* Thus, a grant of immunity pursuant to 18 U.S.C. Sections 6002-3 was necessarily insufficient to adequately protect Yanagita and Kondo from use of their trial testimony against them in a Japanese prosecution.

Some federal courts faced with similar claims by grand jury witnesses have asserted that F.R. Crim. P. 6(e), which provides for some

(cont.) crime in every country, including the U.S. Indeed not only is it punishable under 18 U.S.C. Sections 2383-5 but several states have enacted comparable provisions. See, e.g., the statutes at issue in Herndon v. Lowry, 301 U.S. 242 (1937); Brandenburg v. Ohio, 395 U.S. 444 (1969); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); McSurely v. Ratliff, 282 F.Supp. 848 (E.D. Ky. 1967).

* Moreover, a U.S. court does not have the power to prevent extradition because the procedure under which the person will be tried in the foreign jurisdiction does not comport with U.S. standards of justice. Neely v. Henkel, 180 U.S. 109 (1901); Gallina v. Fraser, 177 F.Supp. 856 (D.Conn. 1959), aff'd. 278 F.2d 77 (2 Cir. 1960), cert. den. 364 U.S. 851.

secrecy around grand jury proceedings, constitutes an adequate substitute for the lack of jurisdiction and control over foreign proceedings. It is contended the secrecy of the proceeding would prevent the testimony from ever falling into the hands of a foreign prosecutor and thus there need be no concern for the lack of power to control that prosecutor's use of evidence he obtains. E.g., In re Tierney, supra at 811-812; In re Parker, 411 F.2d 1067, 1069-1070 (10 Cir. 1969), vacated and dism. as moot, 397 U.S. 96 (1970). Elsewhere, this view has been sharply disputed and rejected. E.g., In re Cardassi, 351 F.Supp. at 1082-1083. See also Tierney v. U.S., 410 U.S. 914, 915-916 (1973) (Douglas, J., dissenting from denial of certiorari).

Whatever the merits of these opposing positions, they are of no concern here. For unlike the witnesses in Tierney, Parker and Cardassi, Yanagita and Kondo are not grand jury witnesses but witnesses at a public trial whose proceedings are recorded and a matter of public record.* There is, therefore, no possibility, on the facts presented here, that either can be adequately protected, either by statute or rule, from foreign use of his testimony.

C. The Fifth Amendment Protects Defendants Against Self-Incrimination Under Articles 77-79 Of The Japanese Penal Code.

This court is thus squarely presented with the constitutional question left unresolved in Zicarelli: whether the Fifth Amendment privilege

* It is also to be noted the Chin trial generated an unusual amount of publicity. Articles appeared in metropolitan newspapers when the Chins were arrested, after the trial of Elizabeth Chin in April, 1976 and after the joint trial at which Kondo and Yanagita were held in contempt.

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protects a witness in a proceeding in a U.S. Court against self-incrimination under the laws of a foreign jurisdiction. If so, the grants of immunity to Yanagita and Kondo were not coextensive with the protection afforded by the Constitution and their assertions of the Fifth Amendment notwithstanding the grants of immunity were proper.

The issue has been directly considered and decided by U.S. District Judge Jon Newman in In re Cardassi, 351 F.Supp. 1080 (D.Conn. 1972), in which it was held that the Fifth Amendment does protect against self-incrimination under the laws of a foreign jurisdiction. Rather than quote or discuss Cardassi at length, we respectfully commend Judge Newman's full opinion to the Court's consideration.

Cardassi was based upon the decision in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), where the U.S. Supreme Court held the Fifth Amendment protects a witness from giving testimony in one jurisdiction which incriminates him under the laws of a second jurisdiction.

In concluding that the Fifth Amendment protects a witness before a state investigating commission from self-incrimination under federal law, the Court relied upon the "settled" English rule regarding self-incrimination under the law of a foreign jurisdiction, U.S. v. McRae, L.R. 3 Ch. App. 79 (1867). In McRae, the U.S. had sought discovery against an individual in the British courts. The English Court of Chancery Appeals denied the application upon the ground that providing the information sought would incriminate the person under U.S. law and that

the individual therefore was privileged to decline to produce in English courts that information. The U.S. Supreme Court relied substantially upon McRae:

"The most recent authoritative announcement of the English rule has been made in 1867 in U.S. v. McRae, where the Court of Chancery Appeals held that where there is a real danger of prosecution, the case could not be distinguished in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for breach of our own municipal law." Murphy v. Waterfront Commission, supra at 67 (citations omitted).

The Court also rejected the erroneous interpretation it had earlier placed on a prior English case, Queen v. Boyes:

"It in no way suggested that the danger of prosecution under foreign law could be ignored if it was "real and appreciable." Supra at 68.

The Court explicitly based its holding in Murphy on this interpretation of English law:*

"In light of the histories, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts..." Murphy v. Waterfront Commission, supra at 77.

It is therefore apparent that protection against self-incrimination under the law of a foreign jurisdiction is within the scope of the Fifth Amendment privilege against self-incrimination as defined by the Supreme Court in Murphy.

Aside from Cardassi, supra, only one other court has addressed

* For a further discussion of these English cases, see Grant, "Federalism and Self-Incrimination," 5 UCLA L.Rev. 1 (1958).

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this question. In a cursory alternative holding, the Tenth Circuit Court of Appeals merely stated, without amplification, that the Fifth Amendment:

"need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, ^{itself} apprehension or admission of a traitorous saboteur acting for such a nation within the U.S." In re Parker, 411 F.2d 1067, 1070 (10 Cir. 1969).

The judgment and opinion of the Circuit was subsequently vacated and the case dismissed as moot. Parker v. U.S., 397 U.S. 96 (1970).

The fact that other nations may make failure a crime (we are unaware of any such provision) is irrelevant to the Fifth Amendment question posed here. The crime of insurrection is one found in almost every nation's laws and one considered serious by every nation.* Moreover, if the concern of the Parker court is that witnesses will refuse to testify, claiming the danger of self-incrimination under foreign laws for crimes such as "failure," the solution is not to narrow the scope of the Fifth Amendment. Instead, the U.S. should exercise its treaty making power against including such offenses in extradition treaties, thus substantially eliminating the danger of use of such self-

* The U.S. has not only enacted an insurrection statute, 18 U.S.C. Sections 2383 et seq, but also a provision making assassination, kidnapping or assault of the President a crime. Title 18 U.S.C. Section 1751. See also statutes at issue in cases cited in footnote on p.24.

incriminating testimony in the foreign jurisdiction by substantially eliminating the possibility of prosecution for such an offense at all.

The facts presented here are relatively uncommon and perhaps unique. As earlier noted, rarely does a criminal statute in a foreign jurisdiction have extraterritorial application. Moreover, the absence of an extradition treaty with applicable provisions will frequently preclude the possibility of foreign prosecution. However, Murphy and Cardassi demonstrate that in the relatively rare circumstances of extraterritorial application of foreign criminal laws and the possibility of extradition, the Fifth Amendment privilege stands as a guarantee against disclosures which are self-incriminating under foreign law.

III. PURSUANT TO TITLE 18 U.S.C. SECTIONS 2515 AND 3504, DEFENDANTS HAD THE RIGHT TO DECLINE TO TESTIFY WHERE THE GOVERNMENT HAD FAILED ADEQUATELY TO RESPOND TO THEIR MOTIONS FOR DISCLOSURE OF GOVERNMENT ELECTRONIC SURVEILLANCE.

A witness at a criminal trial has the right pursuant to 18 U.S.C. Section 2515 to decline to answer questions derived directly or indirectly from illegal electronic surveillance to which the witness may object. U.S. v. Huss, 482 F.2d 38 (2 Cir. 1973); In re Horn, 458 F.2d 468 (3 Cir. 1972); In re Allen, 12 Crim. L. Rep. 2343 (D.C. Cir. 1973). In order to exercise this right effectively, a witness has the right pursuant to 18 U.S.C. Section 3504 to require the government to "affirm or deny" whether or not there has been electronic surveillance. The government's response to the witness' motion must be made before a Court may properly

order a witness to testify and it must be sufficient to allow the witness meaningfully to determine whether or not (s)he has been subjected to electronic surveillance, the necessary predicate for determining whether the witness may have the statutory right to decline to answer the questions posed. People v. Einhorn, 45 AD 2d 75, 356 NYS 2d 620, rev'd on other grounds, 35 NY2d 948, 365 NYS2d 171, 324 N.E.2d 551 (1974).^{*} If the government fails to make a response which is legally sufficient, the witness may decline to testify. E.g., In re Quinn, 525 F.2d 222 (1 Cir. 1975); U.S. v. Vielguth, 502 F.2d 1257 (9 Cir. 1974); Beverly v. U.S., 468 F.2d 732 (5 Cir. 1972); People v. Einhorn, supra.

It is submitted the government's response to defendant's respective motions for disclosure of electronic surveillance was inadequate as a matter of law and that each defendant could therefore properly decline to testify.

The relevant circumstances were as follows:

* In reviewing a judgment of criminal contempt founded upon a refusal to comply with a court order to testify before a grand jury, the Einhorn Court noted the witness and his counsel were entitled to "know exactly what they were up against." 356 NYS2d at 624. Once the claim of electronic surveillance had been duly made and prior to the witness' having to decide whether or not to answer the questions, it was the duty of the government to affirm or deny the alleged illegal interception. Said the Court: "To say that no harm can come to the witness who faces such a crucial decision, because he can always have a suppression hearing in conjunction with his trial for contempt, is to overlook the fact that the time for the witness to have the information which, according to federal law he is entitled to have, is during the grand jury proceedings, when he is to make his choice as to whether he will or will not answer the questions propounded to him." Id.

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Defendants are each of Japanese extraction and currently reside in Los Angeles, California. Counsel met defendant Kondo for the first time on Friday, June 18, three days before trial of the superseding indictment in Chin.* In the course of our discussion, Kondo related that when approached and questioned by an agent from the Bureau of Alcohol, Tobacco and Firearms who was investigating this case he was shown a paper containing information which had been discussed in a telephone conversation between Kondo and the defendant Young-Chin sometime in August, 1975 (which is within the period of time during which the indictment alleges the crimes were committed). Kondo informed counsel that to the best of his knowledge the government could only have acquired this information through overhearing the aforementioned telephone conversation. We thereupon realized there was a possibility Kondo had been the subject of governmental electronic surveillance or overheard thereon and that the government was seeking to obtain information from him on the basis of such surveillance. In response to further inquiry, Kondo said he had encountered several unusual difficulties in his telephonic communications.**

* Counsel had advised Ethan Levin-Epstein, Assistant U.S. Attorney, it was desirable that Kondo come to New York a few days in advance of trial so that we might confer with him and apprise him of his legal rights and obligations. Levin-Epstein arranged an early prepayment of the travel fee specifically so that this consultation might occur. Kondo flew to New York on June 17, the first time he had been here since being served with his subpoena. The meeting on the following day was the first time counsel discussed with Kondo his legal situation.

**These included repeated inability to reach a number dialed except with the assistance of an operator, frequent inability to get a dial tone, hearing voices on the line other than those of the person to whom Kondo was talking, hearing a sound resembling that of a tape recorder, and a visit from a man claiming to be from the phone company and who further

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It was thereupon concluded there was sufficient basis for requesting the government to determine whether it had overheard R. Kondo; accordingly, a motion requesting disclosure of governmental surveillance, supported by affidavit incorporating the facts Kondo had related, was filed on his behalf on the morning of the next Court day, Monday, June 21, prior to the commencement of the Chin trial.

Based upon the facts related by Kondo which raised the possibility the government had conducted electronic surveillance in connection with the underlying criminal case, counsel questioned Mr. Yanagita in this regard when he arrived in New York City from California on Sunday, June 20. From what he related, we believed there were likewise sufficient facts as to Yanagita to request that the government determine whether or not there had been electronic surveillance of him.* An appropriate motion and supporting affidavits were therefore prepared and filed with the Kondo application.

Counsel for the witnesses stated on the record that based upon the facts in the supporting affidavits, each of them believed there was a

(cont.) claimed he was under Kondo's house to repair the phone, although Kondo had no knowledge or expectation a repairman was to be there on that occasion.

*.. Yanagita related a frequent inability to obtain the normal dial tone on his phone, that he would hear a series of clicks which in Los Angeles should only occur on a call placed outside the message unit area but which had occurred on calls placed inside that area, that he would frequently hear voices on his line other than those of the person(s) with whom he was communicating, and that he had often encountered static so severe that a conversation had to be discontinued or the call replaced.

realistic possibility the questions they were to be asked at trial were derived at least indirectly from unlawful electronic surveillance of each of them or their premises, respectively. To aid the government in its inquiry regarding this matter, the witnesses respective home addresses and home telephone numbers were provided. A response from the government was requested only with respect to the period from the date of the motions, June 21, 1976, to July 29, 1975 (the first date mentioned in the Chin indictment) or the date the government's investigation began, whichever happened first. No inquiry was requested as to possible electronic surveillance of counsel.

Further, counsel stated on the record that we were not necessarily requesting an inquiry with every federal agency, but at least those which had been involved in the investigation of the underlying case, and that to our knowledge this included the Federal Bureau of Investigation, the Secret Service and the Bureau of ATF. (In this regard it should be noted the FBI and Secret Service played the major investigatory role in this case prior to the arraignment of the Chins on October 6, 1975. It was the FBI in Los Angeles which provided the initial investigative lead and the Secret Service which procured and effected the warrant for the search of the Chin's premises, which led to the government's seizure of the firearms involved in this case. The Chins were in fact arrested by the Secret Service. Many of the public statements made by the government with respect to this case were made by the Secret Service or the FBI).

The government's response consisted of an oral representation by the Assistant U.S. Attorney prosecuting the case, Ethan Levin-Epstein, to the effect that he knew of no electronic surveillance of Yanagita or Kondo. In this representation (which was unsworn but which Levin-Epstein offered to make under oath), the Assistant U.S. Attorney carefully and specifically noted he was not representing that there had been no government electronic surveillance of movants but only that based upon his own knowledge he knew of none.*

The second part of the government's response was an affidavit from Thomas R. Pattison, another Assistant U.S. Attorney in the Eastern District of New York. In addition to his assertion that he had no personal knowledge of electronic surveillance of Yanagita and Kondo (in effect the equivalent of Levin-Epstein's statement), Pattison stated only that the ATF had no record of surveillance on movants' respective home phone numbers.** Pattison also

* "MR. LEVIN-EPSTEIN: I'm ready to say what I know and to my knowledge there has been no electronic surveillance anywhere in the case. Why I say 'my knowledge,' the Court, I am sure, recognizes--

"THE COURT: Can you affirm as absolutely as you can that any of the testimony that you intend to solicit from Yanagita and Kondo were not the product of any electronic surveillance?

"MR. LEVIN-EPSTEIN: Yes, with this qualification: I am representing what I know, as an individual, and not what I know as part of the Government." (T. 30-31).

** In pertinent part, the affidavit read as follows: "In connection with the witnesses Kondo and Yanagita's motions relative to electronic surveillance, your deponent has been informed by Special Agent Edward Gervin of the Bureau of ATF, the investigating agency involved, that they have no record of any electronic surveillance conducted on telephone numbers 213-732-4592 or 213-939-1423. This information was provided to your deponent on this date and was the result of communications with the Na-

stated orally that the ATF Agent in charge of the case had no knowledge of electronic surveillance. There was no denial of electronic surveillance of Kondo or Yanagita individually; there was no denial of electronic surveillance of their respective home premises (only that their phones were not tapped); most significantly, there was no inquiry with either the Secret Service or the FBI, despite the fact both were admittedly actively involved in the investigation of the underlying case.

Defendants respectfully submit this response was insufficient as a matter of law.

The Court of Appeals for the Second Circuit has examined the responsibility of the government under Section 3504 to reply to a witness' demand for disclosure of electronic surveillance, and its opinions are helpful in providing a framework for analysis.

In U.S. v. Grusse, 515 F.2d 157 (2 Cir. 1975), two grand jury witnesses were adjudged in contempt for refusal to testify after being granted immunity by the District Court. On appeal they contended the government had failed adequately to respond to their claims of electronic surveillance. These claims were "based on conclusory statements that the questions asked must have come from such surveillance, as well as more particularized claims to telephone malfunctioning and unusual sounds heard on telephones." In re Grusse, 402 F.Supp. 1232, 1234 (D.

(cont.) 'tional Headquarters of the Bureau of Alcohol, Tobacco and Firearms.

Moreover, your deponent has no knowledge from any source whatsoever that the witnesses Kondo or Yanagita were ever the subject of any electronic surveillance."

Conn. 1975). The government in turn filed an affidavit of the Assistant U.S. Attorney stating that inquiry had been made with "the appropriate federal agencies" and that based upon the results of that inquiry there had been no surveillance of the witnesses or their premises. The witnesses were permitted to examine the AUSA; they established his affidavit was based upon inquiry with "the Special Agent of the FBI, "the agency investigating the matter at hand," 402 F.Supp. at 1236, which Agent had supervisory responsibilities for the case.

The majority in the Court of Appeals assumed the witnesses had made a sufficient showing to trigger the government's obligation to respond to their claim of surveillance.* In examining the related question of the adequacy of the government's response, Judge Lumbard noted the affidavit by itself was "probably insufficient," 515 F.2d at 159, but that the defect was cured by the AUSA's testimony that the inquiry had been made with the FBI, "the agency investigating the matter at hand." Op.cit. The second judge in the majority, Judge Timbers, relied upon the opinion of the District Court in upholding the sufficiency of the government's reply. The District Judge's view was essentially the same as that of Judge Lumbard: "Here the Government has made a denial of wiretapping, based upon the report of the agency investigating the matter at hand. The denial covers the witnesses and names of attorneys they furnished the Government. It covers the named persons and 'their premises'. I find this denial sufficient to satisfy 18 U.S.C. Section

* Judge Oakes, in dissent, so held explicitly. 515 F.2d at 159.

3504, in the context of a contempt proceeding against an immunized Grand Jury witness, under the current standards prevailing in this Circuit." 402 F.Supp. at 1236. *

In In re Buscaglia, 518 F.2d 77 (2 Cir. 1975), immunized grand jury witnesses made a claim of electronic surveillance of them at certain social clubs based solely upon the asserted refusal of the government attorney to affirm or deny surveillance at those clubs.** The government denied by affidavit any surveillance of the witnesses' homes, and the AUSA represented orally to the Court that "there is no and there have been no wiretaps." Thereafter an FBI agent involved in investigating the case filed an affidavit stating there had been no electronic surveillance at the clubs and that FBI records revealed no such surveillance. The government attorney also filed an affidavit swearing he prepared the questions asked the witnesses, that those questions were prepared exclusively from reports derived from first-hand observation by an FBI agent and an FBI informant, and that to the best of his knowledge the questions were not derived from electronic surveillance. Not surprisingly, the Court found these several affidavits and representations a sufficient response to the claim of electronic surveillance made by the witnesses there.

* Judge Oakes would have required the AUSA to make inquiry with several other federal agencies, although they were not directly involved in the investigation at issue. 515 F.2d at 160.

** The claim was minimized still further by the admission that the government had denied surveillance as to Buscaglia.

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In In re Millow, 529 F.2d 770 (2 Cir. 1976), an immunized witness was held in contempt for refusal to testify before a federal grand jury. In reviewing Millow's contention, inter alia, that the government had failed to respond adequately to his claim of electronic surveillance, the Court of Appeals set forth two principles which are relevant here. First, the Court held that

"the allegations of unlawful wiretapping required to trigger the government's obligation to respond by affidavit or sworn testimony need only set forth a colorable claim..." 529 F.2d at 774 (emphasis added).*

Secondly, once this burden is met,

"those government agencies closest to the investigation must scrupulously search their files ~~and~~ submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked." Id. (emphasis added).**

Reading Grusse, Buscaglia and Millow together establishes that to trigger the government's obligation under Section 3504 a witness

* The Court's comparison of Millow's claim to that made in Grusse, supra, see Millow, 529 F.2d at 774, suggests the showing in Grusse may be viewed as a standard in this regard.

** Millow's "claim" consisted solely of an assertion a government attorney had purportedly admitted in court electronic surveillance beyond that the legality of which had previously been determined. The Court recognized this assertion was based upon a misunderstanding by Millow of what had actually been said and that there had been no such statement by the prosecution. 529 F.2d at 773 and n.7. Consequently, there was in reality nothing submitted to support Millow's claim. The Court ruled in that circumstance there was no statutory obligation on the government to respond.

need only set forth a "colorable claim," approximating that made in Grusse, and that once such a claim has satisfactorily been made, the government must respond under oath based upon inquiry with whatever government agency(ies) is/are involved in the investigation.***

Application of the foregoing principles to the instant case compels the conclusion the government did not make a legally sufficient response to defendants' claims.

Defendants' belief questions to be asked them were derived from electronic surveillance was based upon the fact that each had encountered a variety of difficulties with their respective home phones far beyond the "normal" difficulties one might expect; second, that during the time of these difficulties, each had talked on their respective phones with one of the Chins and that the conversations were related to the subject matter of the Chins' indictment; and that defendant Kondo, when questioned by a government agent investigating the case, had been shown a paper containing information which had been the subject of at least one of his phone conversations with Elizabeth Chin and which he believed the government agent could have obtained only through electronic surveillance of that conversation.

This showing far surpasses the "claims" in Buscaglia and Milloy

***. Inquiry need not go beyond those agencies involved in the investigation. (This was the point in dispute between the majority and dissent in Grusse. See also Buscaglia, supra.)

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and by its specificity exceeds that in Grusse, which, as earlier noted, may be used as a standard. Moreover, the claim set forth by Yanagita and Kondo matches or exceeds those held to be sufficient by other courts. See, e.g., In re Quinn, 525 F.2d 222 (1Cir. 1975); U.S. v. Vielguth, 502 F.2d 1257 (9 Cir. 1974); In re Marx, 451 F.2d 466 (1 Cir. 1972). See also the claims made in U.S. v. Alter, 482 F.2d 1016 (9 Cir. 1973) and Beverly v. U.S., 468 F.2d 732 (5Cir. 1972), reversing contempts for failure of the government to respond to claims of surveillance of a witness' attorney. (With respect to such claims, an even higher standard than that, in the case of surveillance of the witness himself must be satisfied before the government is obligated to respond. U.S. v. Vielguth, supra.) Indeed, we have been unable to find a single case in which a showing equivalent to that made here was not held sufficient to require the government to respond.

Obviously, a claimant could rarely, if ever, actually establish by himself that he had been the subject of electronic surveillance, for such surveillance is intended to be and is accomplished surreptitiously. Section 3504 was enacted precisely in recognition of this reality, and in an effort to place responsibility for disclosure to the Court of electronic surveillance upon the party which had all the facts and was therefore in the best position to make that disclosure. To require a witness to make a greater claim than defendants made here would sub-

stantially defeat Congressional intent in enacting Section 3504.

With respect to the central question, the adequacy of the government's response to the witnesses' claims of electronic surveillance, it is submitted that the failure of the government attorney to make inquiry with the Selective Service and the FBI, the two agencies "centrally" involved in the underlying investigation, renders its response fatally defective under the principles set forth in In re Millow, supra and comparable decisions.

The unanimous Millow Court stated the government's response must be based upon inquiry with "those government agencies closest to the investigation." Op.cit. Here, it was the Secret Service which applied for and executed the search warrant which resulted in the seizure from the Chins of the guns which were the subject of their indictment and which were, according to the government, provided them by Yanagita and Kondo. It was the Secret Service which arrested the Chins. It was the FBI office in the city where Yanagita and Kondo each live which provided the investigative lead to the Secret Service in New York which directly resulted in the search of the Chins premises and their arrest based upon seizure therefrom of the aforesaid weapons. On these facts, Millow plainly mandated inquiry with these two agencies.

The circumstances here bear a striking similarity to those in In re Quinn, 525 F.2d 222 (1 Cir. 1975), in which the Court of Appeals unani-

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mously reversed a contempt judgment for refusal to testify before a grand jury, holding that the government's response to the witness' claim of electronic surveillance was not legally sufficient. Quinn had stated in an affidavit that examination of the questions to be propounded indicated clearly that they were based upon electronic surveillance; Quinn stated that one set of questions concerning legal fees could only have been derived from surveillance of a conversation he had had with an attorney. Subsequently, his attorney represented to the Court that Quinn had encountered extensive interference on his phone.

The government filed five separate affidavits, two of which are relevant here. In one, the U.S. Attorney for the District swore he was familiar both with the investigation and the proposed questions and that to his knowledge none of the questions were based upon electronic surveillance. In the second, a Special Agent of the Bureau of ATF stated he was in charge of the investigation, had personally conducted a substantial portion of it and was familiar with the investigatory work of the other ATF Agents. He then denied there had been any electronic surveillance.

The Court of Appeals concluded these responses did not meet the Government's statutory obligation. Its reasoning is fully applicable here and we therefore quote the Court at length:

"Although 18 U.S.C. Section 3504 speaks only of denying or affirming the allegedly illegal acts, courts have interpreted the

statute to require the Government to make it reasonably clear that its denial is based on sufficient knowledge to be meaningful.

See In re Alfred L. Hodges, Jr., 524 F.2d 568 (1 Cir. 1975).

A balance must be struck between accepting worthless responses,⁵ on the one hand, and, on the other, creating standards so refined and technical as to invite protracted interruption of grand jury proceedings. In general we shall expect the Government's denial to be amplified to the point of showing that those responding were in a position, by firsthand knowledge or through inquiry, reasonably to ascertain whether or not relevant illegal activities took place; but we shall not ordinarily require evidentiary hearings nor shall we require unrealistically perfect affidavits in connection with a Section 3504 response.

The present affidavits appear to us to go a considerable distance by meeting Quinn's specific charges and presenting informed denials by those directly concerned with the Quinn investigation. But we find them deficient in one respect. They leave open the possibility that the Quinn inquiry is based, in some part, on information or leads furnished by other agencies about whose sources and activities neither Mr. Deachman nor Mr. Sawyer may know. Both men deny knowledge of any electronic surveillance, but they would not necessarily know the means used by other federal agencies to gather the information, if any, that was furnished to their respective staffs for used in the Quinn investigation.⁶

In some cases, this possibility might seem remote. But the instant investigation involves activities with international overtones which could reasonably have engaged the attention of agencies other than the Bureau of Alcohol, Tobacco and Firearms and the local United States Attorney; and such other agencies might to some degree have fueled the present inquiry. Indeed, the Assistant United States Attorney handling the case was not from New Hampshire but was specially assigned from the Department of Justice in Washington.

We think, therefore, that for the Section 3504 response to be adequate in this case, there must be included an explicit assurance indicating that all agencies providing information relevant to the inquiry were canvassed. This requirement may be met in various ways. The simplest here might be a representation, by supplemental affidavit, that the Government's questions to Quinn are not directly or indirectly, in whole or in part, the product of information from outside investigations, but that they come exclusively from the investigatory efforts of the two agencies about whose activities Mr. Deachman or Mr. Sawyer have knowledge (viz. the New Hampshire United States Attorney's office and the Bureau

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of Alcohol Tobacco and Firearms). If there should turn out to be any collateral sources, the Government should, of course, provide affidavits so indicating and showing due inquiry thereof.

5. A denial of knowledge of illegal wiretapping is obviously worth nothing if the affiant was in a position to know nothing.

In In re Alfred L. Hodges, Jr., 524 F.2d 568 (1st Cir. 1975), we explained that our decision in In re Mintzer, 511 F.2d 471 (1st. Cir. 1974), is not to be read as a blanket endorsement for denials consisting solely of the prosecutor's affirmance of lack of knowledge and non-utilization of any taps in framing questions.

6. Paragraph (a)(1) of Section 3504 refers both to evidence that is the "primary product of an unlawful act" and to evidence "obtained by the exploitation of an unlawful act." If either is claimed, the "unlawful act" must be affirmed or denied." 525 F.2d at 225-226 (emphasis added).

The instant case is on all fours with Quinn; indeed we need not speculate whether the activities in question "could reasonably have engaged the attention of agencies other than" the Bureau of ATF, id at 225, or whether "such other agencies might to some degree have fueled the present inquiry," id at 226, for we know, based upon news accounts and documents on record in the Chin case, that both the Secret Service and the FBI were actively involved in the government's investigation here. On these facts, Quinn required there be an "explicit assurance " that the Secret Service and the FBI were inquired of to determine whether either had conducted electronic surveillance to which Yanagita or Kondo might object.

Santangelo v. People, 49 A.D.2d 220, 374 NYS 2d 107, rev'd on other

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grounds 38 NY2d 536, 381 NYS2d 472 (1976), is also strongly supportive of defendants' contention. There, a state grand jury witness demanded the state disclose whether or not it had conducted electronic surveillance or whether federal government agencies had conducted such surveillance. The State's attorney declined to make inquiry with the federal agencies. On appeal, the Appellate Division reversed, holding that because of the federal government's acknowledged role in the investigation, the prosecutor was obliged to make a good faith inquiry of federal law enforcement agencies to determine whether Santangelo had been surveilled. 374 NYS2d at 110-111. If a prosecutor must make inquiry regarding surveillance of a witness ~~with~~ the relevant agencies of a separate governmental jurisdiction, it follows a fortiori that he should be obliged to make due inquiry with agencies within the same government which are actively involved in the investigation.

We note that an inquiry with each of the federal agencies involved here is not only the means to meaningfully protect the witness' right of privacy guaranteed by Section 2515. It is, moreover, the means of protecting "the imperative of judicial integrity" in federal criminal trials, Elkins v. U.S., 364 U.S. 206, 222 (1960), by assuring the Court does not become the unwitting accomplice of use of questions derived directly or indirectly from illegal electronic surveillance. Gelbard v. U.S., 408 U.S. 41, 52 (1972). This concern is by no means abstract.

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Cases are legion in which the government has at first denied the existence of electronic surveillance, only then, upon further inquiry, to determine its earlier denial was incorrect. In Black v. U.S., 385 U.S. 26 (1966) and O'Brien v. U.S., 386 U.S. 345 (1967), for example, unknown to the government's trial attorneys, the defendants therein had been overheard by electronic surveillance, a fact which was not disclosed until after the cases had reached the U.S. Supreme Court years later. The Court held that new trials were required in each case. See also Schipani v. U.S., 385 U.S. 372 (1966) and U.S. v. Schipani, 289 F.Supp 43 (E.D.N.Y.1968), a similar case arising in this District.

In In re Tierney, 465 F.2d 806 (5Cir. 1972), the government denied under oath in the District Court that it had conducted electronic surveillance of grand jury witnesses or their attorneys. On appeal of the contempt judgments, the government was forced to retract its sworn denial, as it had discovered in the interim that an attorney for the witnesses had in fact been overheard. Id at 813.

In Smilow v. U.S., 472 F.2d 1193 (2 Cir. 1973), the government had denied surveillance of a grand jury witness and on that premise the Second Circuit had affirmed. 465 F.2d 802. On certiorari, however, the Solicitor General confessed the government's earlier denial was incorrect, thus necessitating a remand to the Court of Appeals. 409 U.S. 944. In remanding to the District Court for further proceedings,

a unanimous Court of Appeals voiced its dissatisfaction with the government's misinformation and identified the difficulty with inadequate initial government inquiries regarding electronic surveillance:

"In view of the history of this case, we cannot forbear expressing our regret that those representing the Government in court were unable, until such a late date, to discover the true state of affairs with regard to official wiretapping of the witness' telephone conversations...If government agencies are going to employ such surveillance techniques, responsibility for accurate description to the courts of the results of these efforts rests with those who make the report. 18 U.S.C. Section 3504. Although in this case a second check of the records elicited a concession of possible error, the litigants, their counsel, and the courts wasted a considerable amount of time working under great pressure because of the original misinformation. In addition, Smilow was in jail for a good portion of that period. We trust that in the future the Government will be more thorough in the investigation of such matters." 472 F.2d at 1195.

In the instant case the government has not been thorough in its inquiry: it has declined to inquire of two federal agencies directly involved in the underlying case. This failure renders its response insufficient as a matter of law.*

The government's affidavit is inadequate for a further reason: it fails to deny surveillance of Yanagita or Kondo. Examination of its wording shows a denial of tapping of the home phones of each of them. This would not preclude the possibility of the government's overhearing

* The government was able to obtain a response from the Bureau of ATF the very day of its inquiry. There was nothing in the record to suggest that inquiry of the Secret Service or the FBI would have taken any longer. Thus, no delay in the underlying trial would have been occasioned by making the same inquiry of these two agencies. Even a short adjournment, however, would not have involved "protracted interruption," (con't. on next page)

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conversations between Yanagita or Kondo and one of the Chins through tapping of the Chins' telephone or through bugging the premises of either.

The government's reply to claims of electronic surveillance must be responsive to the particular claims made. See, e.g., Beverly v. U.S., 468 F.2d 732 (5 Cir. 1972), reversing contempt judgments founded upon refusals to testify before a federal grand jury based upon the government's having denied some but not all of the particular claims of surveillance. In response to a claim of electronic surveillance of a witness, it is not enough to deny surveillance over one phone when the relevant conversations of the witness might well have been overheard through tapping of the phone of the person to whom he was talking or through bugging of the premises. The government's response must be full and unequivocal. Beverly v. U.S., supra. Such was not the case here.

In re Quinn, supra, of the trial. We note that in U.S. v. Huss, 482 F.2d 38, 40-41 (2 Cir. 1973), the District Court adjourned an important trial involving three defendants for a week in order to allow the government to determine whether there had been electronic surveillance of a trial witness.

IV. AN ACTING ASSISTANT ATTORNEY GENERAL IS NOT AUTHORIZED UNDER TITLE 18 U.S.C. SECTION 6003 TO APPROVE A GOVERNMENT APPLICATION FOR IMMUNITY TO COMPEL SELF-INCRIMINATING TESTIMONY OF A WITNESS AT A FEDERAL TRIAL; THE GOVERNMENT'S APPLICATION FOR AN ORDER COMPELLING KONDO'S TESTIMONY WAS THEREFORE UNAUTHORIZED AND THE RESULTANT ORDER INVALID.

Title 18 U.S.C. Section 6003 sets forth the procedure which the government must follow in applying to a federal court for an order compelling a trial witness to give self-incriminating testimony. The application must be made by the U.S. Attorney for the District and it must specify that in the judgment of the U.S. Attorney the testimony sought may be necessary to the public interest. Moreover, the application may only be made after approval therefor is obtained from one of certain specified officials. Section 6003(b) is explicit: the application may be made only "with the approval of the Attorney-General, the Deputy Attorney-General or any designated Assistant Attorney General." The designation contemplated by Section 6003(b) is accomplished in 28 C.F.R. Section 0.175:

"(a) The Assistant Attorney General in charge of the Criminal Division is authorized to exercise the authority vested in the Attorney General by sections 2514 and 6003 of Title 18, United States Code, to approve the application of a U.S. attorney to a federal court for an order compelling testimony...by a witness in any proceeding before...a court of the United States,... when the subject matter of the case or proceeding is within the cognizance of the Criminal Division..."

The government represented to the Court that Robert L. Keuch, an Acting Assistant Attorney General, was the individual who had approved the government's application for an order compelling the testi-

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mony of defendant Kondo at the Chin trial. It presented a telecopy of a letter from Keuch to Assistant U.S. Attorney Levin-Epstein authorizing the government's application. It is submitted that an Acting Assistant Attorney General, as a matter of law, is not authorized by Section 6003(b) to approve a government application for a court order compelling testimony.

Whether an official not expressly included in Section 6003(b) as one who may approve an application for an order compelling testimony may lawfully approve such an application has not been specifically decided by any Court. However, the U.S. Supreme Court has examined an analogous situation in U.S. v. Giordano, 416 U.S. 505 (1974), and thereby indicated this question should be answered in the negative.

In Giordano, the Court reviewed the validity of a government application for a wiretap order which had been authorized by the Executive Assistant to the Attorney-General of the United States. Title 18 U.S.C. Section 2516(1) specifies such an application must be made with the authorization of "the Attorney-General, or any Assistant Attorney-General specially designated by the Attorney-General."

The government argued the Attorney-General had the power under 28 U.S.C. Section 510* to authorize other individuals, such as the Exec-

* 28 U.S.C. Section 510: Delegation of Authority: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by another officer, employee or agency of the Department of Justice of any function of the Attorney General."

utive Assistant, to approve such applications. The Supreme Court unanimously rejected this argument and held that Congress did not intend to authorize wiretap applications to be authorized by any individuals other than those specified in Section 2516(1).

The bases of the Court's decision are instructive with respect to the question before this Court. The Court found that where a statute "expressly addressed" which individuals could authorize an application, the Attorney General did not have the power to designate individuals other than those named in the statute to authorize an application. Giordano, supra at 514. It noted that despite the power to delegate powers and responsibilities conferred upon the Attorney-General by 18 U.S.C. Section 510, Congress had exercised its right specifically to limit the authority of the Attorney General in this regard with respect to applications for warrants for electronic surveillance and that such limitation must be respected and enforced. In other words, a statute enacted subsequent to Section 510 which specifies which officials in addition to the Attorney General may authorize an application is to be read as a limitation upon the general authority given the Attorney General under Section 510.

The Supreme Court also relied upon the legislative history of the statute. It noted there had been discussion of the need to confine the power to authorize applications for surveillance orders to assure responsible executive determinations whether or not a wiretap order should be sought. The Court found an intent to limit the ability to authorize

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such applications to persons responsive to the political process, the Attorney General or an Assistant Attorney General.* In light of this legislative history, it was clear an Executive Assistant, not designated by statute and not subject to the political process for appointment, could not properly authorize an application / ^{for} an order for electronic surveillance.

Subsequent to Giordano, the Court of Appeals for the Third Circuit specifically held that an Acting Assistant Attorney General could not properly authorize an application for an order for electronic surveillance under 18 U.S.C. Section 2516(1). U.S. v. Acon, 513 F.2d 513 (3 Cir. 1975). The Court stated as follows:

"In the present case, the government argues that an acting assistant attorney general is not the same as the attorney general's executive assistant. Although for other purposes this may be true, we cannot agree in this context. Congress has created a very narrow and specific authorization power. An acting assistant attorney general is not mentioned in the statute. Neither does an acting assistant attorney general meet the Supreme Court's test of political responsiveness. As such, an acting assistant attorney general who has not been appointed by the President and confirmed by the Senate may not be designated specially to authorize wiretaps under Section 2516(1)." 513 F.2d at 516.

See also, U.S. v. Boone, 348 F.Supp. 168 (E.D.Va. 1972).

In the instant case, similar considerations mandate a finding that an application for an order compelling self-incriminating testimony can-

* Title 28 U.S.C. Section 506: "The President shall appoint, by and with the advice and consent of the Senate, nine Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties."

not properly be made by an Acting Assistant Attorney General.

In Section 6003(b), as in Section 2516(1), the "matter of delegation is expressly addressed." Giordano, op.cit. The statute specifies that only the Attorney General, the Deputy Attorney General or a designated Assistant Attorney/may authorize an application for an order compelling testimony. It does not provide that such authority may be exercised by an Acting Assistant Attorney General or any other official.

A District Court which examined this question found because Section 6003(b) specifically designated officials who could authorize an application for an order compelling testimony, that its provisions were to be read as a limitation upon Section 510 and that an official not named in the statute could not properly authorize an application for such an order. In F.T.C. v. Foucha, 365 F.Supp. 21 (N.D. Ala. 1973), the question of who could authorize an application for an order compelling testimony under Section 6004 was examined. That section specifies the procedure by which an administrative agency may apply for an order compelling testimony and provides that an order may be requested "with the approval of the Attorney General." Unlike Section 6003(b), Section 6004 does not designate any other officials who can approve an application for an order compelling testimony.

The government contended the Attorney General could designate other officials to authorize an application for an order compelling testimony under Title 28 U.S.C. Section 510. In upholding the government's con-

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tention, the court contrasted the Attorney General's power to designate other officials to authorize such applications under Section 6004 with his power under Section 6003, and found the Attorney General could designate other officials/approve an application under Section 6004, but not under Section 6003:

"I conclude that the third explanation should be adopted--that Congress, by failing to specify in Section 6004 (as it had in Section 6003) additional persons in the Attorney General's office who could grant approvals, intended to give the Attorney General the broader range of authority to delegate existing under 28 U.S.C. Section 510.../U/se of additional words such as found in Section 6003 has been held to indicate a limitation upon the power to delegate." F.T.C. v. Foucha, supra at 24 (citations omitted).*

Section 6003(b) reflects the intent of Congress that all applications for orders compelling testimony be screened by a central authority. As in Section 2516(1), the central authority, that is, the officials designated in Section 6003(b), are subject to the political process through their appointment by the President and confirmation by the Senate. See 28 U.S.C. Sections 503, 504, and 506.

This specific feature of the statute was endorsed by the Department of Justice:

"We think that it is advantageous to have all applications for immunity grants pass through the Attorney General as this title provides so that a centralized

* Cf. U.S. v. Cuomo, 525 F.2d 1285 (5 Cir. 1976), where the court held the Attorney General could delegate through 28 U.S.C. Sec. 510 the power to certify to a court that an individual should be prosecuted under the Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. Secs. 5031-42. The Court based its decision on the fact that 18 U.S.C. Sec. 5032 does not contain a specific delegation of authority, and thus, the case was distinguishable from Giordano, where the matter of delegation was specifically addressed in the statute.

due to his desire to avoid 'the essential and inherent cruelty' of self-accusation, the odium attached to a confession of guilt or the imposition of civil or economic disabilities which the grant of immunity does not erase."* While these are not interests of constitutional dimension,** it has been recognized by the Court of Appeals for this Circuit that they are of Congressional concern in the enactment of compulsory testimony legislation. In re Vericker, 446 F.2d 244, 247 (2 Cir. 1971). They are therefore properly to be considered by the official who is to approve or disapprove the government's application for an order compelling testimony.

Secondly, once a witness testifies pursuant to Sections 6002-3, there is an "affirmative duty" upon the government to demonstrate that any subsequent prosecution of the witness is based upon evidence "derived from a legitimate source wholly independent of the compelled testimony." Kastigar v. U.S., 406 U.S. 441 (1972). Experience has shown this burden to be complicated and difficult to meet. E.g., U.S. v. McDaniel, 482 F.2d 305 (8 Cir. 1973); U.S. v. Dornau, 359 F.Supp. 684 (SDNY 1973), rev'd. on other grounds, 491 F.2d 473 (2 Cir. 1974).*** Accord-

* Reif, "The Grand Jury Witness and Compulsory Testimony Legislation," 10 Am. Crim. L. Rev. 829, 845 (1972).

** Compare majority opinion in Brown v. Walker, 161 U.S. 591 (1896) with dissenting opinion of Justice Field.

*** In at least one case, the "Watergate" related prosecution of former White House aide Gordon Strachan, the government reluctantly concluded that it had to dismiss the prosecution since it could not meet its burden of showing its case was derived from sources wholly independent of Strachan's Senate testimony.

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ingly, a delicate judgment may have to be made, balancing the need for testimony in a current prosecution against the difficulty of succeeding in a future one.

Centralizing authority for approving applications for compulsory testimony orders in the Attorney General, the Deputy Attorney General and the designated Assistant Attorneys General maximizes assurance that both these interests will be meaningfully considered in a given case. That is, the witness' interest in avoiding the inherent cruelty of self-accusation, the odium attached to a confession of criminal conduct and the collateral disabilities not erased by the immunity which may be conferred can properly be weighed against the government's need for the testimony by a person experienced in making these evaluations who is accountable to the political process. Similarly, the determination whether to risk dismissal of a future prosecution in order to obtain testimony for a current one is also a judgment which would be entrusted to a person normally experienced in making such determinations and who is politically accountable for them. These concerns are properly satisfied by interpreting Section 6003(b) as it reads, as not permitting authorization by an Acting Assistant Attorney General or other person not normally called upon to make the judgments called for and not accountable in the political process for such judgments.

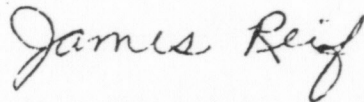
Since the government's application was not properly authorized, it was invalid and an order compelling Kondo's testimony should not have been entered.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the informations and the motions for judgments of acquittal which will be made should be granted.

Dated: Brooklyn, New York
July 12, 1976

Respectfully submitted,



James Reif
Amy Gladstein
GLADSTEIN, MEYER & REIF
308 Livingston Street
Brooklyn, New York 11217
(212) 858-9131

Attorneys for Michael Kazuo Yanagita and Marc Choyei Kondo

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D:GWS:ms UNITED STATES DISTRICT COURT
753, 538 EASTERN DISTRICT OF NEW YORKFILED 295
U.S. DISTRICT COURT E.D. NY
NOV 11 1975

UNITED STATES OF AMERICA :

- against - :

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, :

Defendants. :

INDICTMENT

Cr. No. _____

T.18 U.S.C. §§371,
922(a)(3) & 2

Exhibit A

THE GRAND JURY CHARGES:

COUNT I

75 CR 051

On or about and between July 29, 1975 and October 4, 1975 within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did knowingly and wilfully conspire to commit an offense against the United States, namely, to obtain firearms in Los Angeles, California, to wit: a U.S. M1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number 89474; an Armalite 180 rifle, Serial Number 12585; and an Armalite AR 180 rifle, Serial Number S-12590, and to transport said firearms from Los Angeles, California into Brooklyn, New York, the State where the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did then reside, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG not being licensed importers, manufacturers, dealers, or collectors, of said firearms, in violation of Title 18 United States Code, Section 922(a)(3).

In furtherance of said unlawful conspiracy and to further the objects thereof, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG did commit the following:

OVERT ACTS

1. On or about July 29, 1975, the defendant ELIZABETH JANE YOUNG purchased a firearm, Serial Number S-12585 from Coles Sporting Goods, 1030 South La Brea Street, Inglewood, California.
2. On or about October 4, 1975 the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, did possess at 925 Union Street, Brooklyn, New York, Apartment 4B, four (4)

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firearms, Serial Numbers 5487136, 89474, S-12585, and S-12590.

(Title 18 United States Code, Section 371).

COUNT II

From on or about August 15, 1975 to October 4, 1975, the exact dates being unknown to the grand jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, both residing at 925 Union Street, Brooklyn, New York, Apartment 4B and not being licensed importers, dealers, or collectors, did knowingly and wilfully transport from California to Brooklyn, New York, four (4) firearms, namely, a U.S. M 1 carbine, Serial Number 5487136; an Armalite AR 7 rifle, Serial Number 89474; an Armalite AR 180 rifle, Serial Number S-12585; and an Armalite AR 180 rifle, Serial Number S-12590 which firearms were purchased in the State of California by the defendants.

(Title 18 United States Code Sections 922(a)(3) and 2.

William P. Egan
FOREMAN

David L. Hage
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

KENNETH RAYMOND CHIN, and
ELIZABETH JANE YOUNG, now
known as "Elizabeth Jane
Young Chin",

Defendants.

----- X

SUPERSEDING INDICTMENT

Cr. No. 75 CR 851 (s)
(Title 18, U.S.C. §§922(a)(3)
2)

Exhibit B

THE GRAND JURY CHARGES:

COUNT ONE

From on or about July 29, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12565 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT TWO

From on or about July 29, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an Armalite, AR-180, .223 caliber,

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semi-automatic rifle, serial number S-12585 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT THREE

From on or about August 12, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12590 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT FOUR

From on or about August 12, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12590 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or

otherwise obtained by them in California. (Title 18, United States Code, Section 922(a)(3) and 2).

COUNT FIVE

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an Armalite, AR-7, .22 caliber, semi-automatic rifle, serial number 89474 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Sections 922(a)(3) and 2).

COUNT SIX

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an Armalite, AR-7, .22 caliber, semi-automatic rifle, serial number 89474 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Section 922(a)(3) and 2).

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COUNT SEVEN

From on or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully transport, from California to New York, a firearm, to wit: an M-1, .30 caliber Carbine, serial number 5487136 which firearm had been purchased or otherwise obtained in California by the defendants. (Title 18, United States Code, Section 922(a)(3) and 2).

COUNT EIGHT

From or about July 1, 1975 to October 4, 1975, the exact dates being unknown to the Grand Jury, within the Eastern District of New York and elsewhere, the defendants KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, now known as "Elizabeth Jane Young Chin", both residing at 925 Union Street, Brooklyn, New York, Apartment 4-B, and not being licensed importers, dealers, manufacturers or collectors, did knowingly and wilfully receive in New York, a firearm, to wit: an M-1, .30 caliber Carbine, serial number 5487136 which firearm had been transported from California to Brooklyn, New York by the defendants, after it had been purchased or otherwise obtained by them in California. (Title 18, United States Code, Sections 922(a)(3) and 2).

A TRUE BILL

FOREMAN

DAVID G. TRACER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK----- X
UNITED STATES OF AMERICA

-against-

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, a/k/a
"Elizabeth Jane Young Chin"Defendants.
----- XCOMMITMENT ORDER

75 CR 851(S)

Exhibit C

WHEREAS, MICHAEL K. YANAGITA, has been called as a witness to testify on behalf of the United States at the trial of the above-captioned matter, and

WHEREAS, MICHAEL K. YANAGITA, has been granted limited use immunity from prosecution under 18 U.S.C., §§6002 and 6003, and

WHEREAS, MICHAEL K. YANAGITA, has refused, notwithstanding the above noted grant of immunity, and the direction of the Court, to answer questions asked of him, and

WHEREAS, MICHAEL K. YANAGITA, has been advised by the Court, in the presence of his attorney, James Reif, Esq., 308 Livingston Street, Brooklyn, New York, that such a refusal to answer will result in a citation for contempt of Court and incarceration for the duration of this trial or six (6) months, whichever is less, and

WHEREAS, MICHAEL K. YANAGITA, has persisted in his refusal to answer questions, basing his refusal

On the privilege against self-incrimination, it
is therefore

ORDERED, that MICHAEL K. YANAGITA, be

immediately remanded to the Custody of the Attorney

General of the United States and/or to the United

States Marshal for the Eastern District of New York,

or any of each of their duly authorized representatives,

to be incarcerated at the place of their proper

selection, for a period not to exceed one (1) month from

this date, or until such time as the trial of the

above-captioned matter, now in progress, shall reach a

verdict.

SO ORDERED.

Dated: Brooklyn, New York
June 22, 1976

JACOB MISHLER

Chief United States District Judge
Eastern District of New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

-against-

COMMITMENT ORDER

75 CR 851(S)

KENNETH RAYMOND CHIN and
ELIZABETH JANE YOUNG, a/k/a
"Elizabeth Jane Young Chin"

Defendants.

Exhibit D

----- X

WHEREAS, MARC CHOYEI KONDO, has been called as a witness to testify on behalf of the United States at the trial of the above-captioned matter, and

WHEREAS, MARC CHOYEI KONDO, has been granted limited use immunity from prosecution under 18 U.S.C., §§6002 and 6003, and

WHEREAS, MARC CHOYEI KONDO, has refused, notwithstanding the above noted grant of immunity, and the direction of the Court, to answer questions asked of him, and

WHEREAS, MARC CHOYEI KONDO, has been advised by the Court, in the presence of his attorney, James Reif, Esq., 308 Livingston Street, Brooklyn, New York, that such a refusal to answer will result in a citation for contempt of Court and incarceration for the duration of this trial or six (6) months, whichever is less, and

WHEREAS, MARC CHOYEI KONDO, has persisted in his refusal to answer questions, basing his refusal

on the privilege against self-incrimination, it is therefore

ORDERED, that MARC CHOYEI KONDO, be

immediately remanded to the Custody of the Attorney General of the United States and/or to the United States Marshal for the Eastern District of New York, or any of each of their duly authorized representatives, to be incarcerated at the place of their proper selection, for a period not to exceed one (1) month from this date, or until such time as the trial of the above-captioned matter, now in progress, shall reach a verdict.

SO ORDERED.

Dated: Brooklyn, New York
June 22, 1976

JACOB MISHLER
Chief United States District Judge
Eastern District of New York

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quite different than those confronting an owner of a building.⁵

The relationship between the standards enunciated in sections 1031 and 1033 reinforce this conclusion. The "like kind" standard of section 1031 is broader than and inclusive of the "similar or related in service or use" test of section 1033.⁶

Section 1031 specifically excludes exchanges of certificates of trust or beneficial interests from the operation of that section. That provision on its face excludes only certificate for certificate exchanges and certificate for property exchanges. It is clear from this, however, that the congressional intent was that an exchange whereby property is given for certificates of trust are not "like kind" exchanges. If such a transfer cannot meet the broader "like kind" language of section 1033, it can hardly be argued that it meets the narrower standard of "similar or related in service or use."

The conclusion is that the taxpayer in this case has taken advantage of the involuntary conversion of his investment to change the nature of that investment. The defendant is therefore entitled to summary judgment.

For the reasons stated above, the defendant's motion for summary judgment must be and hereby is GRANTED. Judgment will be entered herein in favor of the defendant.



5. The Court need not reach the question of whether purchase of shares in a business trust constituting control of that trust would qualify under the ambit of section 1033's provision relating to the purchase of control of a corporation. Int.Rev.Code of 1954 § 1033(a)(3)(A).

Whether or not section 856 trusts may be considered as corporations for purposes of section 1033, the plaintiff could not have acquired

UNITED STATES of America,

v.

Michael Kazuo YANAGITA, Defendant.

UNITED STATES of America,

v.

Marc Choyei KONDO, Defendant.

Nos. 76 Cr 420, 76 Cr 421.

United States District Court,
E. D. New York.

Aug. 17, 1976.

Defendants sought to dismiss indictment charging them with contempt of an order requiring them to testify in a criminal case under a cloak of immunity. The District Court, Dooling, J., held, *inter alia*, that orders directing defendants to testify under a cloak of immunity in criminal prosecution was not based upon a sufficient assurance that illicit wiretapping had no part in developing defendants as witnesses; consequently, in absence of such assurance, indictment charging defendant with contempt in refusing to comply with order was subject to being dismissed.

Indictment dismissed.

1. Witnesses C-20, 21

The same acts may be made the subject of two commitments, one civil and addressed simply to obtain the testimony, and the other for criminal contempt consisting in the disobedience of an order to testify under cloak of immunity. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

2. Witnesses C-21

Indictment charging defendants with refusal to obey order to testify in criminal

the control necessary to qualify under section 1033. A real estate investment trust organized under section 856 cannot by definition be controlled by one investor. See Int.Rev.Code of 1954 § 856(a)(6). The plaintiff maintains that the trusts remained qualified under section 856 after the purchases in question.

6. See footnote 1, *supra*.

prosecution under a cloak of immunity was not subject to being dismissed on ground that defendants had already been punished for their alleged contempt by being jailed for duration of trial where, despite form of commitment orders, each order was in its setting and operative terms a civil order of contempt intended to obtain defendant's testimony, with manner of punishment, as distinguished from coercion to testify, being reserved. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

3. Witnesses ⇐304(3)

The alleged fear of a Japanese prosecution of defendants for their roles in furnishing firearms to an individual who planned to make an attempt on the life of Emperor Hirohito of Japan was too chimerical to be a factor in defendants' disobedience of order to testify under a cloak of immunity; there was no more reason to expect prosecution than to expect the Japanese court to exclude the testimony as coercive. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

4. Witnesses ⇐304(3)

A factor in analyzing the extent to which incompleteness of protection against later use of the testimony ought to constitute a lawful ground for refusing to obey an order to testify, where a risk of foreign prosecution arises, must be the attitude of the foreign jurisdiction toward judicially compelled testimony and self-incrimination. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

5. Witnesses ⇐304(3)

If a foreign jurisdiction in which a defendant allegedly risks prosecution recognizes a privilege against self-incrimination and rejects judicially compelled self-incriminatory testimony, it would and could be expected to recognize rule that testimony cannot be compelled in absence of immunity or a comparable rule, but if a foreign jurisdiction does not accord a privilege against self-incrimination and uses conventional judicial sanctions to compel testimony, it would be difficult to say that such a circumstance should inhibit use of testimony in the

United States since no local or foreign right or privilege of the defendant would be invaded by compelling the testimony. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

6. Extradition ⇐14(2)

If a foreign country seeks extradition on the basis of testimony that has been compelled under an order of the court in the United States, or information derived from such testimony, the source of the information may perhaps be a ground for defending against the extradition proceeding conducted in a court of the United States. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

7. Witnesses ⇐304(3)

Order directing defendants to testify in prosecution with stipulations that no testimony given in obedience to order would be used against defendants in any criminal case, except a prosecution for perjury or otherwise failing to comply with order, adequately protected each defendant against future use of testimony and, as such, was not subject to being disobeyed on ground that it was inadequate. 18 U.S.C.A. §§ 3504, 6002, 6003(a); 28 U.S.C.A. §§ 401(3), 1826(a).

8. Witnesses ⇐21

Question respecting propriety of holding in civil contempt case that challenge to proceedings to compel testimony based on allegation of illicit eavesdropping came too late and that application was not sufficient to impose on Government the duty to make an agency search was reviewable in district court as a threshold issue to be redetermined before criminal contempt trial commenced, notwithstanding that initial determination would ordinarily have been the law of the case, where the confrontation between the parties in the criminal contempt case was on a new although pendent issue. 18 U.S.C.A. § 3504.

9. Criminal Law ⇐627.8(3)

Witnesses ⇐21

Whatever the unfortunate effect of the tactics resorted to by counsel for the de-

defendants in respect to alleged eavesdropping by Government upon defendants' telephone communications, there was not a sufficient evidentiary base to support a conclusion that challenge to contempt proceedings to compel testimony based on allegation of illicit eavesdropping came too late and that application was insufficient to impose on Government the duty to make an agency search. 18 U.S.C.A. § 3504.

10. Indictment and Information ⇐ 144.1(1)

Witnesses ⇐ 304(1)

Orders directing defendants to testify under a cloak of immunity in criminal prosecution was not based upon a sufficient assurance that illicit wiretapping had no part in developing defendants as witnesses; consequently, in absence of such assurance, indictment charging defendant with contempt in refusing to comply with order was subject to being dismissed. 18 U.S.C.A. §§ 3504, 6002, 6003(a).

11. Witnesses ⇐ 21

Unlike the Grand Jury witness who can be called before the Grand Jury a second time it is determined after hearing that there has been no illicit eavesdropping, that is not true in case of a witness at a criminal trial whose refusal to testify might irremediably determine outcome of case. 18 U.S.C.A. §§ 3504, 6002, 6003(a).

12. Witnesses 304(1)

Decision of the United States Supreme Court putting the power of a grand jury witness to decline to testify squarely on the policy behind the applicable statute has also been extended to a trial witness. 18 U.S.C.A. §§ 3504, 6002, 6003(a).

13. Witnesses ⇐ 21, 304(1)

Latter approving an order compelling testimony under a cloak of immunity, signed by a deputy assistant attorney general as acting assistant attorney general in stated absence from Washington of assistant attorney general in charge of criminal division and his senior deputy assistant, was insufficient to comply with requirements of statute and, accordingly, defendants could not be held, after event, to have been guilty of a criminal contempt in disobeying an

order which the United States attorney had not been authorized to request. 18 U.S.C.A. §§ 6003, 6003(a, b).

14. Witnesses ⇐ 304(1)

The statute respecting issuance of orders compelling testimony under a cloak of immunity by the Attorney General or the assistant attorney general requires approval by an assistant, not a deputy assistant. 18 U.S.C.A. §§ 6003, 6003(a, b).

James Reif, Amy Gladstein, Brooklyn, N. Y., for defendants.

Ethan Levin-Epstein, Asst. U. S. Atty., for the Government.

DOOLING, District Judge.

Each of the defendants was, it is admitted for present purposes, called as a witness for the Government during the trial of *United States v. Chin and Young*, 75 CR 851(S). Each declined to answer on the ground that his testimony might be used to incriminate him, and each was then ordered to answer. The order was in each case, professedly made under 18 U.S.C. 6003(a) with the intended effect, under Section 6002, that no testimony given in obedience to the order (nor any information derived from it) "may be used against the witness in any criminal case, except a prosecution for perjury . . . or otherwise failing to comply with the order." On the advice of counsel each defendant declined to testify, and, despite warnings and an adequate opportunity to reconsider their refusals to testify, both defendants continued to decline to testify and were committed to the custody of the Attorney General or the Marshall "for a period not to exceed one (1) month from" the date of the order, June 22, 1976, "or until such a time as the trial of the [*Chin and Young* case], now in progress, shall reach a verdict." The order did not contain an explicit purge provision. However, it was made clear to each defendant, of record in open court, that he could purge himself by testifying at any time before the verdict was rendered, and that if he persist-

ed in his refusal to testify, he might face further proceedings. Defendants filed notices of appeal to the Court of Appeals from the commitment orders and applied in that Court for a stay of commitment. The stay was denied. The appeal has evidently not been prosecuted, and motions by defendants to withdraw the appeals are pending.

[1,2] 1. It is argued that the defendants have already been punished for their alleged contempt by being jailed for the duration of the trial and cannot constitutionally be punished a second time. Despite the form of the commitment orders, each order was in its setting and operative terms a civil order of contempt intended to obtain the witness's testimony, 28 U.S.C. 1826(a). The matter of punishment, as distinguished from coercion to testify was reserved. Whether or not it should be the law, it appears to be settled, by implication, and it is not at this time denied, that the same acts may be made the subject of two commitments, one civil and addressed simply to obtaining the testimony, and the other for criminal contempt consisting in the disobedience of the order to testify (18 U.S.C. 401(3)).

2. Defendants are citizens of the United States by birth and are residents of the United States. Their testimony was expected to disclose their role in furnishing firearms to Chin. The Government apparently had evidence or information—quite irrelevant to the charges in *United States v. Chin and Young*, 75 CR 851(S)—that Chin and Young planned to make an attempt on the life of Emperor Hirohito of Japan when he visited New York in October 1975. Defendants argue that the order under 18 U.S.C. 6002 does not protect them against the use of their evidence against them in a criminal proceeding in Japan and that defect legitimated their refusal to testify. Defendants refer to sections of the Japanese Penal Code punishing "insurrectionary or seditious" acts committed "with the object of overthrowing the government, seizing the territory of the state, or otherwise subverting the national constitution," and punishing complicity in such acts or at-

tempts at them, punishing those who prepare or conspire civil war, and punishing those who aid in such crimes by furnishing arms. Under the Code such acts, if committed outside Japan, subject the actor to Japan's criminal jurisdiction.

[3] It is doubtful in the extreme that the rather careful language of the Code extends to assassination of the emperor who, under the Constitution, is emphatically not the sovereign but is "the symbol of the State and of the unity of the people." But in any case the alleged fear of Japanese prosecution is too chimerical to be a factor; there is no more reason to expect prosecution than to expect the Japanese court to exclude the testimony as coerced.

[4,5] The development of the law in and since *Murphy v. Waterfront Commission*, 1964, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, emphasizes, as the dominant factor in analysis, the extent to which incompleteness of protection against later use of the testimony ought to constitute a lawful ground for refusing to obey the order to testify. A factor in such an analysis, where a risk of foreign prosecution arises, must be the attitude of the foreign jurisdiction toward judicially compelled testimony and self-incrimination. It is certainly more than merely arguable that if the foreign jurisdiction recognizes a privilege against self-incrimination and rejects judicially compelled self-incriminatory testimony, it would and could be expected to recognize the rule in the *Murphy* case or a comparable rule. On the other hand, if the foreign state did not accord a privilege against self-incrimination and used conventional judicial sanctions to compel an accused's testimony, it would be difficult to say that such a circumstance should inhibit use of the testimony in this country: no local or foreign right or privilege of the witness would be invaded by compelling the testimony.

[6] Finally, it is by no means clear that if a foreign country sought extradition on the basis of testimony that had been compelled under an order of a court in the United States under such a statute as 18

U.S.C. 6002, 6003, or information derived from such testimony, that the source of the information could not be a ground for defending against the extradition proceeding conducted in a court of the United States. So much would appear to flow from the language of Section 6002.

[7] It is concluded that the order did protect each defendant adequately against future use of the testimony against him.

3. Defendants argue that they had experienced difficulties with their telephone communications that led them to infer, at least when they put their telephone experiences in context with the Government's apparent knowledge of facts that might have been learned from overhearing certain telephone conversations, that their telephones might have been tapped. When summoned to testify they raised the point with the United States Attorney and in Court. The Court accepted and acted upon the Assistant United States Attorney's assurance that there was no record in the Bureau of Alcohol, Tobacco and Firearms, the investigating and charging agency, of such eavesdropping and that there was no such eavesdropping known to the United States Attorney's office. Defendants argue that the obvious gap in the "agency check" was in not making inquiry of either the Secret Service or the Federal Bureau of Investigation, both of which agencies had a role in the development of the investigation out of which the firearms indictment grew. Defendants point out that they drew the United States Attorney's attention to these two agencies.

[8] Certainly if this were all, the inquiry made by the United States Attorney's office and reported to the Court would not satisfy the standard of *United States v. Toscanino*, 2d Cir. 1974, 500 F.2d 267, 281; cf. *United States v. Grusse*, 2d Cir. 1975, 515 F.2d 157, 158. But the trial court had held that the challenge to the proceedings to compel testimony based on the allegation of illicit eavesdropping came too late, and that the application was not sufficient to impose on the Government the duty to make an agency search under 18 U.S.C. 3504. The

question, then, is whether that determination is reviewable in the district court as a threshold issue to be redetermined before the criminal contempt trial can commence. In ordinary course, the trial judge's determination would be "the law of the case" unless reversed on appeal, and it is difficult to say that the criminal contempt trial is not the same "case," if in an extended sense. But the ultimate issue in the criminal contempt case is different: the adversary parties are the same but the confrontation is on a new although pendent issue. It is concluded with reluctance and misgivings that the issue must be re-examined.

[9] It is concluded that, whatever the unfortunate effect of the tactics resorted to by counsel for the defendants, there was not a sufficient evidentiary base to support a conclusion that the motion was unduly delayed and could not be regarded as timely. So far as concerns the conclusion that the defendants' showing did not impose on the Government the duty, under 18 U.S.C. 3504, to make a broader agency check, the record leaves it unclear whether that conclusion was a finding based on the motion papers or was in part derived from the partial agency check that Mr. Pattison was able to make and to relate in his affidavit. The affidavits submitted for the defendants were certainly not demonstrative that their telephones were wire-tapped: they sufficed in reporting a coincidence of telephone malfunction and reporting the possession by a Government agent of information that could have been derived from telephonic eavesdropping. Cf. *In re Millow*, 2d Cir. 1976, 529 F.2d 770, 774. The affidavits did not have to go farther; the person whose telephone has been covertly tapped is inevitably hard put to demonstrate that that occurred which was designed to be undiscoverable. The affidavits were not really met by any intimation of what other source had led the Government to the defendants and to their link with Chin and Young. There remains, then, the unexplained failure to make any check with FBI and Secret Service agents in a case that may well have grown out of the alleged assassination plot

UNITED STATES v. YANAGITA

Cite as 418 F.Supp. 214 (1976)

investigation in which those agencies participated.

[10] It is therefore concluded that the orders to testify were not based upon a sufficient assurance that illicit wiretapping had no part in developing the defendants as witnesses.

[11,12] It is not now possible, as in many Grand Jury cases, to have an evidentiary hearing to determine whether or not there were any wiretaps and whether or not, if there were, they were what led to the defendants' questioning. In many of the Grand Jury cases the witness can still be called and the testimony compelled if there has been no illicit eavesdropping. The original direction to testify is invalidated, but, after a hearing, a new direction can be given. That is not true in the case of the witness at a criminal jury trial whose refusal to testify might determine the outcome of the case. But *United States v. Huss*, 2d Cir. 1973, 482 F.2d 38, 44, accepted the Government's concession that the trial witness, like the Grand Jury witness, is protected by 18 U.S.C. 2515, 3504. As *Gelbard v. United States*, 1972, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179, put the power of a Grand Jury witness to decline to testify squarely on the statutory policy behind and the language of 18 U.S.C. 2515 and not on any constitutional ground, cf. *United States v. Calandra*, 1974, 414 U.S. 338, 347-349, 354-355 and fn. 11, 94 S.Ct. 613, 38 L.Ed.2d 561, the ground of the concession is plain enough, and the damage to orderly trial proceedings appears to be irremediable. Cf. *United States v. Huss*, *supra*, 482 F.2d at 45 and fn. 6. That *Gelbard* as extended to the trial witness requires further scrutiny in the appellate courts (cf. *Stone v. Powell*, 1976, — U.S. —, 96 S.Ct. 3037, 49 L.Ed.2d —), or perhaps better, by the Congress, is clear. It is difficult, under Section 2515 as now understood, to visualize the circumstances in which a criminal contempt charge is proper if a trial witness is advised by and relies on counsel. Cf. *Maness v. Meyers*, 1975, 419 U.S. 449, 460, 465-467, 473 (concurring opinion), 95 S.Ct.

534, 42 L.Ed.2d 574; *United States v. Leyva*, 5th Cir. 1975, 513 F.2d 774, 777.

4. It is argued that in the case of defendant Kondo, 18 U.S.C. 6003(b) was not complied with. That subsection requires that the United States Attorney's request for an order under Section 6003(a) be approved by the "Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General." The letter of approval in defendant Kondo's case was signed by a Deputy Assistant Attorney General (as Acting Assistant Attorney General) in the stated absence from Washington of the Assistant Attorney General in charge of the Criminal Division and his senior Deputy Assistant. The Department of Justice regulations in 28 C.F.R. 0.175 contain the Attorney General's delegation to the Assistant Attorney General in charge of the Criminal Division of his powers of approval under Section 6003 and the Assistant (like certain other assistants, such as the Assistant in Charge of the Antitrust Division) is, with them, authorized to redelegate that authority "to their respective Deputy Assistant Attorney Generals to be exercised solely during the absence of such Assistant Attorney Generals from Washington" (28 C.F.R. 0.178). The reported practice in the Division is that the ranking deputy acts on the request in the Assistant's absence and the next ranking deputy acts in the absence of both his seniors. This is the ordinary path of delegation for matters not controlled by particular statute (cf. 28 C.F.R. 0.133; note 28 U.S.C. 510).

The competing considerations are, on the one side, the importance of preventing a lapse of the practical power to approve urgent requests and, on the other, satisfying the statutory duty to obtain an approval from an officer of defined senior responsibility. Section 0.178 can be, conceivably, read as authorizing redelegation, in case of the Assistant's absence, to any of his deputies, but there is ambiguity since the plural may refer to "the deputy" of each of the Assistants named in Section 0.175(b).

[13,14] It must be doubted that so loose a procedure comports with the Congression-

al purpose. The statute requires approval by an Assistant, not a Deputy Assistant. That purpose may be one that can never be carried out in the sense of genuinely having the Assistant make a deliberative decision in each case, but it can be carried out to the extent of fixing accountability upon him, and so much the Congress has made clear. It is concluded that the letter authorization in defendant Kondo's case is insufficient.

That does not mean that, had the defendant answered the question in obedience to the order that he would not have been protected. *Cf. Garrity v. New Jersey*, 1967, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562. The protection follows from the coercion. But that is not the present case. Here the question is whether the defendant could be held, after the event, to have been guilty of a criminal contempt in disobeying an order which the United States Attorney had not been authorized to request.

It is

ORDERED in each case that the indictment is dismissed.



George L. ROUNDTREE, a minor, et al., Plaintiffs,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia Corporation, Defendant.

Civ. A. No. 73-569.

United States District Court,
M. D. Florida,
Tampa Division.

Aug. 17, 1976.

Husband and children of deceased truck driver brought wrongful death action against railroad. Following jury verdict in

favor of railroad, plaintiffs moved for new trial. The District Court, John L. Miller, J., sitting by assignment, held that evidence sustained finding that the railroad was not negligent; and that evidence of prior collisions at the same railroad crossing was properly excluded.

Motion denied.

1. Railroads ⇨348(2, 3)

Evidence that a train 150 feet north of the road could be viewed by motorists 256 feet from the crossing, that a motorist traveling 55 or 60 miles per hour who saw the train at that point would be able to stop in time, that flashing lights were visible ½ mile away from the crossing, that statute required motor vehicle operators to slow down when nearing railroad crossing notwithstanding the posted speed limit, that the posted speed limit on the road in question was 65 miles per hour, and that the signals were working sustained finding that railroad was not negligent, on theories that it maintained inadequate warning devices and that the crossing and surrounding terrain were hazardous, with respect to collision between truck and train.

2. Railroads ⇨347(4)

In order to use evidence of prior accidents at railroad crossing to prove that railroad had notice of dangerous or defective condition at the crossing plaintiffs were required to show that the prior accidents occurred under conditions substantially similar to those prevailing at the time of the accident in question; other factors such as issue confusion and prejudice to the railroad when weighed against the probative value of the evidence are to be considered. Federal Rules of Evidence, rule 403, 28 U.S.C.A.

3. Railroads ⇨347(4)

Where train-truck collision in question occurred at 7:30 on a sunny morning and involved an east bound motorist who would have been traveling directly into the path of the rising sun, and where two other accidents, evidence of which was sought to be admitted against the railroad, involved

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss
LYDIA FERNANDEZ

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern
District of New York.

That on the 1st day of December 19 76 he served a/copy of the within page proof
Appendix

by placing the same in a properly postpaid franked envelope addressed to:
Gladstein, Meyer & Reif, Esqs.
308 Livingston Street
Brooklyn, N. Y. 11217

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County
of Kings, City of New York.

Lydia Fernandez

Sworn to before me this

1st day of December 19 76

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41 4618298
Qualified in Queens County
Term Expires March 30, 1977